

AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

HEARING

BEFORE THE

SUBCOMMITTEE ON INTELLECTUAL PROPERTY
AND JUDICIAL ADMINISTRATION

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRD CONGRESS

FIRST SESSION

JUNE 16, 1993

Serial No. 42

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AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

WEDNESDAY, JUNE 16, 1993

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON INTELLECTUAL PROPERTY
AND JUDICIAL ADMINISTRATION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 10 a.m., in room 2237, Rayburn House Office Building, Hon. William J. Hughes (chairman of the subcommittee) presiding.

Present: Representatives William J. Hughes, Don Edwards, Carlos J. Moorhead, Howard Coble, James F. Sensenbrenner, Jr., and Steven Schiff.

Also present: Hayden Gregory, counsel; Edward O'Connell, assistant counsel; Phyllis Hendersen, secretary; and Thomas Mooney, minority counsel.

OPENING STATEMENT OF CHAIRMAN HUGHES

Mr. HUGHES. The hearing of the Subcommittee on Intellectual Property and Judicial Administration will come to order.

The Chair has received a request to cover this hearing, in whole or in part, by television broadcast, radio broadcast, and still photography, or by any of such methods of coverage. In accordance with committee rule 5(a), permission will be granted unless there is objection. Hearing no objection, such coverage is permitted.

Good morning and welcome to the hearing of the Subcommittee on Intellectual Property and Judicial Administration on the amendments to the Federal Rules of Civil Procedure.

The cost of obtaining legal assistance in our society is often beyond the means of many of our constituents. Reducing the cost of litigation should be a priority for all of us.

Congress responded to the need for reform in part by passing the Civil Justice Reform Act of 1990. The hearing today is focused on an attempt by the judiciary to parallel such reform by amending the Federal Rules of Civil Procedure.

The Supreme Court of the United States is empowered to prescribe general rules of practice and procedure for cases in the Federal court system pursuant to the Rules Enabling Act. In this process, the Judicial Conference appoints committees to propose such rules, and in reality the Conference has a primary responsibility for the amendments.

The act provides that proposed changes to the Federal Rules of Civil Procedure will take effect on December 1, so long as the pro-

posed rules had first been transmitted to Congress by the Supreme Court not later than May 1, of the year in which the rule prescribed is to become effective, and Congress does not act with respect to the amendments by December 1, of that year. This method of amending the Federal Rules of Civil Procedure has been in effect since about 1934.

In general, amendments to the rules have engendered little opposition in Congress or in the legal community as a whole. That, most definitely, is not the case for the proposed changes before us today. Proposed changes to rule 11 and the discovery rules 26, 30, 31, 33, and 37 are the focal points of this particular controversy.

When addressing these reforms, we must keep in mind rule 1 of the Federal rules and its call for a just, speedy, and inexpensive determination of every action as well as section 2072's injunction against abridging, enlarging or modifying substantive rights.

Rule 11, as now in force, requires that a court sanction a party if the court finds that a motion or pleading introduced by the party violates the rule. The sanctions may include costs and attorney fees to the adversary.

As proposed, new rule 11 would leave sanctions to the discretion of the district judge, and sanctions would be payable to the adversary only in the event of unusual circumstances.

Proposed rule 11 also allows a 21-day grace period for a party to remove his motion or pleading once he has received notice from his opponent that rule 11 sanctions will be sought. Witnesses for the new rule 11 will testify that mandatory sanctions were an impediment to the development of novel legal theories.

There is also evidence that controversies that involved civil rights issues in the past were the subject of a disproportionate amount of rule 11 sanctions.

Opponents of the rule feel that mandatory sanctions had a positive effect on the number of frivolous lawsuits, and they oppose these changes.

Discovery rules concern the process through which a lawyer obtains information from the other side to be used in litigation. Discovery has been characterized as the process by which lawyers leave no stone unturned, provided, of course, they can charge by the stone. They often do.

Rule 26 governs most of the discovery process and the present system has been the target of near universal criticism. The U.S. Judicial Conference, in an attempt to streamline the discovery process, has proposed new rule 26(a), which calls for mandatory disclosure of matters "pleaded with particularity." Champions of the proposed rule believe that it will avoid the unnecessary expenses that are the hallmark of the discovery process as it stands today.

Opponents feel that mandatory disclosure is contrary to the adversary process and will compromise the attorney-client privilege. They also feel that the standard that is "pleaded with particularity" is too vague and will only increase the discovery burdens on the system instead of reducing them. They feel that a change of this nature should be taken with extreme caution and should await the results of the civil justice reform experiments.

A third controversial rule change relates to rule 30, which provides the means of taking depositions. At the present time, leave of court or stipulation of the parties is necessary if nonstenographic means are to be employed. Proposed rule 30(b) would allow a lawyer to use nonstenographic means without leave of court or stipulation of the party.

Concerns have been raised in this area about the reliability and durability of videotape or audiotape alternatives to stenographic depositions. The reasoning behind the new proposed rule is that the use of stenographers for every deposition may be an unnecessary expense.

Critics of this proposed rule argue that the real cost of litigation will not be reduced because depositions that are to be introduced at trial must be transcribed anyway. They also feel that the effect of this rule will be to compromise the integrity of the judicial process.

The desire to implement new technology and the parallel development of new technology in both stenographic techniques and video and audio recording further complicates this issue.

The need for reform to the civil justice system is an idea that all sides involved can agree on. Reform must, however, take place on the basis of reasoned discourse. The magnitude of these reforms demand it, and this hearing is designed to provide a forum for that discourse.

It promises to be a very interesting, informative and, I am sure, helpful discourse today.

The gentleman from California, the distinguished ranking Republican.

Mr. MOORHEAD. Thank you, Mr. Chairman.

I want to commend our chairman for the prompt hearings on proposed amendments to the Federal Rules of Civil Procedure. The vast majority of rule changes that have been recommended by the Committee on Rules of Practice and Procedure should go into effect. That committee represented here today by its Chairman, Judge Keeton, should be commended for their hard work and excellent work product, although I may reserve judgment at this time on two or three of their proposed changes.

This subcommittee processed the Civil Justice Reform Act of 1990, which has as its very primary purpose the reduction of costs and delays associated with civil litigation. This law requires each district in the country to draft and implement plans to reduce costs and delay in our Federal court system. These plans should be ready in each district by December 1993. Forty-one districts have their plans in place. I am not familiar with all the details of these plans, but I understand that 23 district plans include some form of prediscovery experiment. At some point, they will report back to Congress the results of these experiments. I am somewhat reluctant to impose any major changes on our Federal court system, especially while these experiments are in process.

I served on the Federal Court Study Committee, and we examined a number of the problems facing our Federal judiciary. I am pleased to see that our former staff director of that committee, Bill Slate, is one of our witnesses this morning. We made our final report to Congress in April 1990. Many of our recommendations were

directed at fine-tuning our Federal court system in order to secure a fair, an expeditious and inexpensive determination of every action.

I would be very reluctant to support any change to rule 11 that would have the effect of weakening the sanctions that judges can impose against lawyers. We all know that virtually all judges and lawyers are concerned about the court system. They want to make it work. But lawyers do get very involved with their clients. And it is up to somebody, and the judges have that role, to see to it that things are kept in line and the courts are kept in line, and that they don't go too far off in one direction.

The Congress and the judiciary actually can do only so much, but I think the bar association has a responsibility to do their part, and they do a very fine job for the most part. But every once in a while there are problems.

No one should be permitted to misuse or manipulate the system to serve a frivolous purpose. Judges must have the authority, and indeed must be encouraged to use that authority to see that the court system runs the way that it should.

I am looking forward to this morning's testimony.

Thank you very much, Mr. Chairman.

Mr. HUGHES. I thank the gentleman.

Does the gentleman from New Mexico have an opening statement?

Mr. SCHIFF. Very briefly.

Mr. HUGHES. The gentleman is recognized.

Mr. SCHIFF. I appreciate your recognizing me.

Mr. Chairman, I am concerned about the wording in the letter of transmittal from Chief Justice Rehnquist in which he states that "while the Court is satisfied that the required procedures have been observed, this transmittal does not necessarily indicate that the Court itself would have proposed these amendments in the forms submitted."

Mr. Chairman, I recognize, perhaps this is standard boilerplate language that has always accompanied these rules and we just didn't notice because there has not been previous controversy that we can remember in recent times, but I personally feel that the U.S. Supreme Court should have a greater role in determining what the rules of procedure in the courts are. And I think that is a subject perhaps you as chairman can take up at some point.

In the meantime, I just want to share my concern over the proposed rules, but I look forward to the testimony that may clarify some of these problems.

I thank you and I yield back.

Mr. HUGHES. If the gentleman will yield, if he yields back, it is interesting because Justice White believes that the Rules Enabling Act should be changed to leave out the role of the Supreme Court entirely.

Mr. SCHIFF. I believe that is because the Supreme Court sees its role as perfunctory. I suspect that Justice White is saying, "If we don't have a substantive role, why does it even go through us?"

I am proposing that the U.S. Supreme Court be given a clear and substantive role. I don't think that the Supreme Court of this land

should submit rules of procedure to the U.S. Congress in which it doesn't concur.

Mr. HUGHES. The gentleman makes a very interesting point.

We have an excellent first panel. Our first panel is the Honorable Robert E. Keeton, from the U.S. District Court for the District of Massachusetts, and Chairman of the Standing Committee on Rules of Practice and Procedure. Prior to his present position, Judge Keeton served as an associate professor at Southern Methodist University and Langdell professor and associate dean at Harvard University. He is a member of numerous associations for trial advocacy, and has published a variety of articles on a variety of legal topics.

Our second panelist is the Honorable Samuel C. Pointer, Jr., Chief Judge, U.S. District Court for the Northern District of Alabama, and Chairman of the Advisory Committee on Civil Rules for the Judicial Conference of the United States. Judge Pointer has had a long and distinguished career in the judiciary, including membership in the Judicial Conference of the United States; the Standing Committee on Rules and Practice; the Judicial Ethics Committee; the Ad Hoc Committee on Asbestos Litigation; the Judicial Conference of the Eleventh Circuit; and President of the Fifth and Eleventh Circuits District Courts Associations.

Our final panelist is Judge William Schwarzer, U.S. district judge for the Northern District of California, and Director of the Federal Judicial Center. Prior to his present position, he served as senior counsel for the President's Commission on CIA Activities Within the United States; as Chairman of the Judicial Conference of the United States, Committee on Federal/State Jurisdiction; and as a member of the American Law Institute's Advisory Committee on Complex Litigation. Judge Schwarzer has published several books and numerous articles on subjects relating to the Federal courts and the administration of justice, and, of course, he is no stranger to this subcommittee. We are very happy to see him and our other panelists today.

We have each of your statements, which are very comprehensive. We have read them, and we will make them a part of the record in full. We would like you to summarize so that we can get right to questions, if you would.

Before I call on you, Judge Keeton, let me tell you, I too want to join with my colleague from California commending the excellent work that your standing committee has done on this and other matters. We thank you very much.

Judge Keeton.

STATEMENT OF ROBERT E. KEETON, DISTRICT JUDGE, U.S. DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, AND CHAIRMAN, STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, JUDICIAL CONFERENCE OF THE UNITED STATES

Judge KEETON. Mr. Chairman and members of the subcommittee, I am very grateful for the opportunity to appear before you, and I am grateful for the gracious comments that both you and Mr. Moorhead have made about the standing committee's work.

My remarks in this brief opening statement will be focused primarily on the rulemaking process, although I do want to urge that the rules that are before you all merit approval. I will urge you to adopt them without modifications.

Let me speak first to the rulemaking process. It is a process that is designed to focus on procedural matters to the exclusion of substantive matters.

I welcome your opening statement with the focus on the statement of the objective of rules in the Federal Rules of Civil Procedure. A similar statement appears also in rule 2 of the criminal rules.

The enabling statute specifies a fourfold rather than threefold objective: One, simplicity in procedural rules; two, fairness in the administration of the rulings; three, just determination on the merits of the actions; and four, avoiding needless delay and expense.

Consistently with those rules I think we have a system in the Rules Enabling Act process that is responsive to the checks and balances system initiated in our Constitution. And I think it is a 20th century gloss on the wisdom of the constitutional drafters that we now have a Rules Enabling Act that specifically focuses on these objectives and for the purpose, with the aim, that the rules shall in the end be fair and neutral substantively. And I strongly urge that that objective be maintained and respected.

I believe it is fair to say that changes that are occurring outside the judicial system in our society generally are placing greater stresses on the judicial system in a variety of ways more than ever before, and one of those ways is illustrated in the rulemaking process.

You have wisely provided for extensive hearings today with representation from a large group of people, perhaps the most thorough hearings that have been conducted by a congressional subcommittee on the rulemaking process, at least since there were hearings on evidence rules.

And I think it is not accidental that you are hearing from more constituencies, because as the processes of administration of justice come under greater stresses and more complex litigation is presented, there are increasing concerns by the participants in that process that they would like to get an edge in the procedural aspects of the matter.

The Committees on Rules have resisted that urge because we take it as our statutory mandate that the rules are to be substantively neutral. We have given very thorough consideration to the rules that are before you at the present time, and even more thorough consideration than is required by the Rules Enabling Act process by additional publication of the most controversial of these rules, those that are the civil rules.

I strongly urge the committee that the Rules Enabling Act process is a wise accommodation of the interests, mutual interests of the three branches of government in participating in this process. I believe each branch and the elements of that branch participating in the process have special institutional competence to deal with their respective aspects of this process.

I do think the Supreme Court of the United States is taking an interest in the rules. It is functioning in a role that is somewhat

different from the delegated role to other elements of the judicial branch, and I think quite appropriately so.

But I think it is also entirely appropriate that you are giving this thorough consideration to the rules that are before you. I welcome that process. I urge that we all respect the process, not either abort it or bypass it with statutes that have not gone through the process, I know this is a concern of the chairman as well, and I certainly welcome that concern and hope to do all we can to encourage the use of this thorough Rules Enabling Act process throughout the system.

Thank you, Mr. Chairman.

Mr. HUGHES. Thank you, Judge.

[The prepared statement of Judge Keeton follows:]

PREPARED STATEMENT OF ROBERT E. KEETON, DISTRICT JUDGE, U.S. DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, AND CHAIRMAN, STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, JUDICIAL CONFERENCE OF THE UNITED STATES

Mr. Chairman and Members of the Subcommittee:

Thank you for permitting me to appear today.

[I am Robert E. Keeton, United States District Judge for the District of Massachusetts and Chairman of the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States.]

I welcome this opportunity to present views for your consideration on the subject of the rulemaking process. This is a subject in which all three branches of government have a vital interest. Our overlapping interests are inherent in our constitutional system of checks and balances. The need for open lines of communication among the three branches may be more compelling in this decade than ever before.

The Judicial Conference of the United States is charged by statute with drafting and recommending rules that "promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay." The growing number and complexity of the controversies brought before the federal courts for resolution make this task increasingly difficult. Added delay and expense in litigation are outgrowths of the volume and complexity of case filings and add urgency to our responsibilities. Several trends contribute to the added numbers and complexity of cases.

First. Both total population and concentration of population continue to increase. Because of the effects of congestion, the numbers of disputes are increasing more rapidly than just proportionally to population increases.

Second. Our economy is changing fundamentally.

One kind of change that bears on lawmaking and the administration of justice concerns the nature of employment. Job descriptions of the work force are changing. Job insecurity is another reason that the number of disputes is growing more than just proportionally to population increase.

Another set of economic changes has the effect that fewer and fewer economic enterprises are primarily local in character. More and more are national, or even international. This set of economic changes has an impact on both lawmaking and the administration of justice. The legislative and executive branches are confronted with more insistent pressures for national or even international legal solutions, supported by arguments for federal legislation establishing nationwide legal rules.

Third. The nature of litigation is changing. More rapid change is occurring in this decade than in any previous decade.

Gone are the days when most indictments had a single count and most civil complaints stated a single claim for breach of contract or tort.

Fourth. The legal profession is changing.

Changes in the legal profession have a bearing on litigation as well as representation of clients in drafting, counseling, and other contexts. More than ever before, distinguished and respected members of the bar are expressing concern about the ability of the profession—lawyers, judges, academics—to maintain the highest standards of professionalism, both in law practice generally and in litigation as well.

More than ever before, trial judges are hearing from many different sources in the bar, in the executive and legislative branches of government, and from fellow judges, that we must take time away from judging in order to spend more time and become more effective in managing cases and caseloads.

Also, more than ever before, the legislative and executive branches are hearing more from lawyers, and from different organized groups within the bar, because they perceive that proposed legislation—and even proposed amendments of procedural rules—affect in distinctive ways their substantive interests and those of their clients.

THE PROCEDURAL RULEMAKING PROCESS

This statement of four trends that affect litigation is barely a thumbnail sketch of changes in the wind and associated challenges. I have spoken of this broader context as an introduction to the much narrower subject matter on which I now focus—the procedural rulemaking process.

NEW STRESSES ON RULEMAKING

I have started this way because I believe these larger developments help to explain some new stresses on rulemaking. They have a bearing on how representatives of the three branches of government may cope with new challenges—working together, respectful of the system of divided responsibility and checks and balances, wisely designed as part of our constitutional framework.

STRENGTH OF THE RULEMAKING PROCESS

I believe in the Rules Enabling Act process. Having made that statement just after referring to our constitutional framework of checks and balances, perhaps I should hasten to recognize that the Rules Enabling Act process was not carved on stone tablets, or written into our Constitution, or written into the Amendments that we identify as the Bill of Rights.

The Rules Enabling Act is a 20th Century gloss on our constitutional framework for solving procedural problems of concern to all three branches of government. It is, nevertheless, faithful to the spirit of 18th Century insights. Also, I believe the Rules Enabling Act process is good not only for this decade of the 20th Century, but for the 21st Century as well. Let me explain briefly why I think so.

The Rules Enabling Act process, as most recently amended in the Judicial Improvements Act in 1988, is, I believe, the most thoroughly open, deliberative, and exacting process in the world for developing substantively neutral rules. By “neutral” I mean rules designed to cause cases to be resolved impartially—that is, on fact findings that are as close to the truth as it is humanly possible to make them, and under the law interpreted and applied with fidelity to constitution, statutes, and precedents.

As litigation grows more complex, we must expect that, somewhat more often than before, particular interest groups in the community generally and even within the bar may take more interest than in times past in trying to gain an edge for the future—that is, an edge in the process of resolving controversies yet to come before the courts. It would be possible, of course, to shape procedural rules to the advantage of one or another among various interest groups. I urge that we resist all pressures to do so. Instead, we should do our best, working together, to keep procedural rules substantially neutral.

The Rules Enabling Act process is well designed for that purpose.

As a way of describing this process, I will state some commonly asked questions and my responses.

WHAT IS THE RULES ENABLING ACT PROCESS FOR ENACTING AND AMENDING RULES?

By a set of statutes—commonly referred to as the Rules Enabling Act—the first step of the rulemaking process is centered in the Third Branch. More specifically, the first step is centered in the Judicial Conference of the United States and six Rules Committees—the five Advisory Committees on Appellate, Bankruptcy, Civil, Criminal, and Evidence Rules, and the Standing Committee on Rules of Practice and Procedure. The Standing Committee reviews all the recommendations of the Advisory Committees and, with any revisions it considers appropriate, forwards them to the Judicial Conference of the United States as proposed amendments to the Rules. If the Judicial Conference approves, it sends the proposed rules to the Supreme Court. If the Supreme Court adopts the rules, it sends them to Congress, ordinarily on or before May 1, to become effective on December 1 unless Congress disapproves or modifies them.

WHO INITIATES PROPOSALS AND WHAT IS THE PROCESS FOR CONSIDERING AND PERFECTING DRAFTS?

Anyone may initiate a proposal to amend or add a rule by sending a letter to Peter McCabe, Secretary to the Committees. The secretary sends each comment to the appropriate Advisory Committee for consideration.

The reporter to that committee analyzes the suggestions and, where appropriate, drafts proposed amendments to the rules and prepares explanatory Advisory Committee notes. The proposals are then discussed in detail by the members at committee meetings. When an Advisory Committee is ready to proceed with proposed amendments to the rules, and the Standing Committee approves publication, the Secretary mails the proposed amendments and Advisory Committee notes to more than 10,000 individuals and organizations across the country, seeking their comments. Also, the Advisory Committee holds public hearings.

The number of comments we receive from lawyers and from interested organizations is increasing substantially. Partly, this may be because recent proposed rule changes have dealt with such controversial subjects as attorney sanctions and reduction of costs and delays in civil cases.

After considering the written comments and testimony from bench and bar, the Advisory Committee makes a fresh decision on the proposed amendments. Proposed amendments are then sent in final form through the Standing Committee to the Judicial Conference.

DOES THE PROCESS NEED TO BE SO ELABORATE AND LENGTHY?

The answer implicit in the Rules Enabling Act is YES, at least in general. The federal rules directly affect the daily business of all the district and circuit courts. They also serve as a pattern for many state procedural rules. The pervasive impact of the federal rules is good reason to make the process exacting and thorough.

ARE OBSERVERS ALLOWED TO BE PRESENT?

Yes, at all stages. The process is very open. All meetings of the Standing and Advisory Committees are open to the public. The minutes of these meetings and the papers of the committees are a matter of public record and may be obtained through the secretary.

WHAT PROPOSED CHANGES ARE AT VARIOUS STAGES IN THE PROCESS TODAY?

Two "packages" of rules changes are in the works. The first package, approved by the Judicial Conference last September, and adopted by the Supreme Court on April 22, 1993 is now before Congress. Among other things, a number of significant, and controversial, changes have been proposed in the civil rules to reduce cost and delay in litigation and to recast Rule 11, governing attorney sanctions. They will take effect on December 1, 1993 unless Congress decides otherwise.

The second package, which contains proposed changes in the appellate, bankruptcy, criminal, and evidence rules was sent to the bench and bar for public comment in late 1992. Of particular interest, the proposals would rewrite Criminal Rule 32, concerning sentencing and judgment, and Evidence Rule 412, dealing with the admissibility of evidence of a victim's past sexual behavior or predisposition in a civil or criminal case. The period for publiccomment on these rules closed on April 15, 1993. The respective Advisory Committees have considered the comments this April and May and have forwarded recommendations to the Standing Committee for consideration at its meeting of June 17-19, 1993. If these amendments to the rules are approved through the five-step process (Advisory Committee, Standing Committee, Judicial Conference, Supreme Court, and Congress) without delay at any point, they can take effect on December 1, 1994.

ARE ANY LONG-RANGE PLANS FOR RULES CHANGES UNDER CONSIDERATION?

Yes.

By statute the Standing Committee is required to review each recommendation of the Advisory Committees and recommend to the Judicial Conference such changes "as may be necessary to maintain consistency and otherwise promote the interest of justice." Some of the separate existing rules deal with the same or closely similar issues in different ways, in some instances just because they were drafted at different times by different drafters. Also, over time and with a succession of amendments, some rules have become unnecessarily complicated.

I have appointed a Style Subcommittee, which has been chaired by Professor Charles Alan Wright, to identify inconsistencies and work toward clarifying and

simplifying the language of the rules. We regret that Professor Wright (at his request because of his new responsibilities as President of the American Law Institute) will be leaving this position at the end of the June meeting of the Standing Committee. I am very pleased that Judge George Pratt has agreed to succeed Professor Wright as chair of this Subcommittee.

Working with Judge Sam Pointer and the Advisory Committee on Civil Rules, the Style Subcommittee now has nearly completed a comprehensive first draft revision of the Federal Rules of Civil Procedure. It significantly reduces the number of words, resolves inconsistencies and ambiguities, and makes the rules much more readable. The committees must do additional work before these style changes (along with the substantive changes essential to resolving ambiguities) are ready for public comment. The committees have made a good start on improving the quality and readability of the civil rules, and I hope a draft will be ready for publication soon.

In the long run, a closer integration of the five separate sets of rules could eliminate needless repetition as well as inconsistencies that leave a reader in doubt as to whether different meaning was intended and, if so, why. Another subcommittee will continue to study the feasibility of closer integration of the different sets of rules.

A third Subcommittee has the assignment to consider Long-Range Planning in a more comprehensive sense. It also functions in liaison with the Long Range Planning Committee of the Judicial Conference of the United States.

WHAT IS THE STATUS OF THE REVIEW OF LOCAL RULES OF COURT?

The local rules project began several years ago under Dean Daniel Coquillette and Professor Mary Squiers of Boston College Law School. At the request of the Standing Committee, they reviewed all the local rules of the district courts and the courts of appeals for consistency with the national rules.

The Administrative Office has distributed widely the findings of the Local Rules Project. One of the principal benefits has been to focus each court's attention on the numbering system for local rules. Out-of-state practitioners and local attorneys inexperienced with federal court practice have complained about not knowing where to locate the many procedural requirements set forth in local rules. Consistent numbering can help. The project has recommended a uniform numbering system for local court rules that is linked to the numbering of the national rules. Most of the courts of appeals now use the recommended uniform numbering system, and a growing number of district courts are adopting the system.

HAS CONSIDERATION BEEN GIVEN TO ORGANIZING THE PROCESS SO AMENDMENTS CAN BE MADE LESS OFTEN?

Yes. There is a perception that the federal rules are amended too quickly and too often. The Standing Committee and the Advisory Committees are very sensitive to this concern. Indeed, many thoughtful and valuable suggestions never reach the public comment stage because they are not considered critical enough by the committees to warrant the serious step of amending the rules.

On the other hand, some court rulings and new legislation inevitably require amendment of rules—and in a few instances, prompt amendment.

We are also very mindful of our statutory obligation to evaluate continuously the operation and effect of the federal rules and to recommend rules changes to promote simplicity and fairness in procedure and to eliminate unjustifiable expense and delay.

THE PROPOSED CIVIL RULES AMENDMENTS

The package of civil rules submitted by the Supreme Court to you this year consists of amendments to twenty-nine existing civil rules and one new rule. Most of the discussion, however, has focused on Rule 11, Rule 26 and other discovery rules, and Rule 30.

The process used in developing the rules before you today has been even more detailed and exacting than is required by the statute.

The proposed rule changes were first discussed by the Advisory Committee on Civil Rules, ably chaired by the Honorable Sam C. Pointer, Jr., Chief Judge of the United States District Court for the Northern District of Alabama. That Committee consists of judges, academics, and practitioners who are experienced in litigation in the federal courts. They are all also keenly aware of the difficulties in rule drafting. This committee of professionals met periodically to develop a first draft of these rules.

The issues addressed by the amendments proposed by the Advisory Committee to Rule 11, Rule 30, and the discovery rules had been previously raised, considered, and debated thoroughly for many years by judges, attorneys, and academics. Numerous legal papers and law review articles have been written criticizing discovery abuse. Indeed, a national consensus appears to be fast approaching calling for the reform of the discovery process to reduce the growing delays and expenses experienced far too often in litigation.

Partly in response, the courts have attempted to address cost and delay problems on a district-by-district basis through amendment of their local rules, particularly those rules governing discovery. Nonetheless, the problems have persisted and reform on a national level continues to be advocated by many as the only real solution.

When the Advisory Committee began to explore these issues, it received many suggestions and draft proposals recommending amendments of the rules. In light of the concerns raised by so many different individuals and organizations in so many different quarters, the Committee was convinced that changes in Rule 11 and the discovery rules were warranted providing courts with greater flexibility in managing their cases. As a result, the Committee studied and authorized several comprehensive surveys of judges and practitioners on the effect of Rule 11. It reviewed many different alternative proposals on discovery and Rule 11 changes, including several pertinent local rules. Only after deliberate and careful study over the course of several years and meetings did the committee develop a first draft of rules.

The draft rules were then reviewed by the Standing Committee, who voted to approve their publication for public comment. Like the Advisory Committee, the Standing Committee is composed of professionals well-versed in the intricacies of rule drafting and in the problems facing the federal courts and litigants.

Most of the draft rules were published in August 1991, accompanied by an invitation for comments from the bench, bar, and public. (Some of these rules had been published in 1989 and received substantial comment. In light of the concerns raised by the comments, the proposed amendments were revised and resubmitted for public comment along with other rules in 1991.)

Copies of the proposed amendments were sent to about 10,000 individuals and organizations, including all federal judges, law schools, state supreme court justices, legal organizations, state attorney generals, newspapers, legal periodicals, and U.S. attorneys. They were also printed in the major legal reporters, e.g. West and Matthew Bender publications. Public hearings were held in Los Angeles, California, in November 1991 and in Atlanta, Georgia, in February 1992.

The comment period was open for six months. Hundreds of written comments were received from a wide spectrum of interests, including defense and plaintiffs bar, corporate counsel, public interest groups, rural, metropolitan, small, medium, and large law firms, academics, and judges. Many of the comments were detailed and scholarly writings often 40 to 50 pages long. Copies of each comment were sent to each committee member for review.

The Advisory Committee held several meetings thereafter and carefully considered the comments and suggestions from the public. Once again the Committee parsed draft sentences and clauses meticulously. As with the original preliminary draft, countless real and imagined fact patterns were suggested to test therecommended draft language. Only after successful completion of this deliberate and exacting examination did the Advisory Committee incorporate suggestions and approve a final draft proposal. The Committee's determinations and reasoning are set forth in its written report, which is attached to the published amendments as submitted to the Standing Committee.

Concurrent with this review and evaluation, the Subcommittee on Style of the Standing Committee was also at work to assist in the rule drafting.

The proposed rules and supporting documentation were transmitted from the Advisory Committee to the Standing Committee in May 1992. A vote was taken by the Standing Committee at its June 1992 meeting here in Washington. By a vote of nine to one, the Standing Committee approved the draft rules with revisions. The rules were submitted to the Judicial Conference in September and, with some additional revisions, then to the Supreme Court.

The proposed rules amendments now before you have gone through an impressive gauntlet of scrutiny. At each stage the rules amendments received fresh and thorough review, as evidenced by the changes made at each level of review. This work product addresses recognized procedural problems and represents the culmination of many years work of many judges, private practitioners, and academics.

Mr. Chairman, before closing, I ask leave to do three things briefly. One is to express a concern that is very much on my mind, and I am aware that it is also a concern you have felt. In a sense, then, I am speaking to the choir, but the message

is one of such importance in my view that I hope you will understand my irresistible impulse to express it.

I am concerned that bills continue to be introduced in Congress to amend federal rules directly by statute, bypassing the Rules Enabling Act process. The Rules Committees and the Administrative Office hope we can help you persuade Members of Congress (and any persons or groups who press Congress to enact rules by statute) that the Rules Enabling Act process is sound and fair, and should be used. Acceleration of the process, in particular instances, may be both feasible and appropriate. We believe, however, that the basic procedures for notice, comment and meticulous care in drafting are especially appropriate for rules of procedure in the courts, and that the benefits of adhering to the process outweigh interests that might be served by quicker action that bypasses these safeguards.

The second thing I want to emphasize is that I urge you to approve all of the rules the Supreme Court has sent to you in the current package, including the most controversial of the Civil Rules.

Third, I would ask you to reject the criticism of the rulemaking process that there was no opportunity for public comment after the Advisory Committee developed its final draft on the civil rules. This argument, followed to its logical end, would result in a static body of Federal Rules. The critics would have liked another opportunity to comment on the new draft that emerged from the committee's deliberations on the earlier comments.

If the process is delayed for republication each time any change is made, a serious risk of deadlock arises. The rulemaking process would be effectively at a standstill while the committee tried to accommodate every constituency and every possible complaint about each new modification of the last published draft.

I submit that the better practice is the one followed in this instance. When the revised draft is in its nature a proposed amendment falling somewhere between the existing rule and the more substantial change proposed in the draft published for comment, republication for another round of comment and reconsideration is neither required nor appropriate.

As I noted earlier, both Congress and the Rules Committees are regularly subjected to demands for more expedited action. I urge that we not adopt a practice, either in this instance or more generally, of such repeated republication for comment that the process is disabled from responding reasonably promptly after a need for amendment is recognized and analyzed, and a neutral and promising solution is fashioned.

Finally, I express again, personally and on behalf of the Standing Committee, appreciation for your permitting me to be heard on these important matters of the Rules Enabling Act process and the specific proposals before you now.

Mr. HUGHES. Judge Pointer, welcome.

**STATEMENT OF SAM C. POINTER, JR., CHIEF DISTRICT JUDGE,
U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF
ALABAMA, AND CHAIRMAN, ADVISORY COMMITTEE ON CIVIL
RULES, JUDICIAL CONFERENCE OF THE UNITED STATES**

Judge POINTER. Good morning, Mr. Chairman and members of the committee.

I, too, urge that Congress allow to take effect on December 1 of this year the various amendments that the Supreme Court has adopted. I will not discuss 19 of those rules and 6 forms, which appear at this time to be noncontroversial, and will only address the few that have generated major controversy.

Rule 11 was proposed and ultimately adopted only after a very unusual procedure, because before any change to rule 11 was adopted or put forward for comment, we actually called for public comment, comment from the bench and bar as to whether rule 11 was working, in what ways it was not and was creating problems.

It was only after that initial period that we did decide and on the basis of two very thorough studies by the Federal Judicial Center that indeed the 1983 version of rule 11, while it was serving the salutary intended purpose of calling on lawyers to stop and think, nevertheless was producing some major problems that need-

ed correction. We attempted to identify what those problems were, and then in the language that was put forward in a published version, attempted to address and remedy those.

Now, those changes, and there were many, as published, provoked much controversy from both sides, both those who said we were not going far enough in changing the 1983 version, and those who were saying we were going too far in those. So we found both types of criticism.

We did make some changes in that process, and the changes that were made ameliorated much of the opposition that was saying we needed to even take further steps to change the amendments from the 1983 version. But at the same time we may have provoked, as you can see through the dissent by the Supreme Court, the opposition on the other side that we were weakening the rule.

We believe that the rule as adopted by the Supreme Court represents an equitable, fair balance between some competing interests that will continue the message of rule 11, while relieving courts and litigants from unnecessary involvement in what might be called frivolous rule 11 motions at times.

When one studies what developed from the five district courts whose rule 11 practice was studied in depth by the Federal Judicial Center, we discovered so many thousands of cases in which rule 11 motions were being presented and addressed to the court with relatively small percentage of those found ultimately to have merit by the court resulting in sanctions.

We think there is a good balance here and we urge that these balances as we have struck them be allowed to go forward and into effect. And I am sure there will be some questions during the question period about some specifics, which I will be glad to respond to.

I move now to rules 26 through 37, and more particularly rule 26(a)(1), the disclosure requirement. I think it is important to understand that these various changes in rules 26 through 37 involve several fundamental notions. One is that we believe that lawyers must become more selective, more restrained, and more efficient in conducting discovery, and they need the support of a judiciary and the rules process to allow that to occur.

Second, the rules that are adopted should accommodate to and enhance the various district courts' ability to comply with the mandates of the Civil Justice Reform Act. Left alone, there is the potential for conflicts between the local plans and the national rules, which we think should be avoided through appropriate changes in the rules.

This committee is aware, I am sure, that at one point in our process we simply said, let's put in an authorization for disclosure without any indication of a default or suggested proposal. We later decided that that was not as good as what we ended up with, and as has been originally published. Here again the committee may have some questions about why we made that type of change.

It is helpful in understanding the disclosure requirements to view this as if there had been interrogatories by a party seeking this limited type of information; an objection by the other side; and then a court ruling rejecting the objections and directing that the interrogatories be answered.

What these rules do, the disclosure, is to say, assume that that has already occurred, and now the parties are under this obligation to provide this core information about the case, much less than what generally is sought and obtained in the majority of cases right now, but this core of information. Some tailoring of other rules was necessary in order to accommodate for this approach.

A key element that was put into the text of the rule after original publication was to require that attorneys meet and confer before commencing formal discovery, indeed to facilitate the process of this mandatory disclosure. That was put from simply a recommendation as to how this would be done into the black letter of the rule itself. It mandates that this be done. And this discussion of counsel of the issues in the case, how they meet the disclosure obligations as well as plan for formal discovery, will then guide the parties and the court in rule 16 scheduling orders, and indeed in resolving what some have feared to be the major horrors lurking within this system.

We believe that this proposal, which includes the option by particular districts to decide they don't want to have disclosure during this period of experimentation mandated under the CJRA, or that they want to modify the particulars as to what the scope of disclosure would be, the timing and such matters, or the types of cases.

This we believe is essential in order to allow districts to go forward with their obligations under the CJRA. As indicated, 23 of 41 districts that have already adopted CJRA plans include some form of disclosure. We think they need to have that legitimized, and indeed other courts that are now planning that same thing received the benefit of our best thinking while getting the option to say, "We want to change it."

Just a couple of comments about rule 30. This, as the chairman noted, only deals with the recording of depositions, not of trial testimony, and much of the correspondence you are likely to get will be misdirected and be concerned about what is going to be happening with the trial of cases. That is not what this is designed to do.

It simply allows attorneys to make the decision as to what type of transcription and recording they would like for the depositions, and to say that judges need not be involved with that, or indeed the general details, the more specific details of that, unless there is a problem that develops.

The rule puts into effect for the first time provisions to safeguard the integrity of videotaped depositions, and indeed, for convenience of courts, says how those videotaped depositions are to be handled at trial when they are offered.

With those already in place in the rule by this change, then it says that judges should not ordinarily have to get involved in that. It is simply a matter then for counsel, taking into account questions such as accuracy, cost and utility to make decisions for themselves.

This is not intended to be an anti-court-reporter provision. We don't believe it will have that effect.

I urge the committee and Congress as a whole not to consider and pursue legislation that would defer the effective date of any of the changes.

Thank you, Mr. Chairman.

Mr. HUGHES. Thank you, Judge.

[The prepared statement of Judge Pointer follows:]

PREPARED STATEMENT OF SAM C. POINTER, JR., CHIEF DISTRICT JUDGE, U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, AND CHAIRMAN, ADVISORY COMMITTEE ON CIVIL RULES, JUDICIAL CONFERENCE OF THE UNITED STATES

Mr. Chairman and Members of the Subcommittee:

I am Sam C. Pointer, Jr., Chief Judge for the Northern District of Alabama and Chairman of the Judicial Conference's Advisory Committee on Civil Rules.

I appreciate this opportunity to review with you the amendments to the Federal Rules of Civil Procedure adopted by the Supreme Court on April 22, 1993, which will become effective December 1, 1993. The Advisory Committee is well aware of the views of judges, attorneys, court reporters, litigants, and members of the public which were expressed while these amendments were being considered and which are likely to be renewed before Congress.

In the interest of brevity, my prepared remarks describe only summarily the amendments that appear to be without substantial controversy. I discuss at greater length those amendments (Rule 11 and Rules 26-37) that have generated the most discussion within the bench and bar. Finally, I address separately the issues that have been raised regarding videotaping of depositions. Due to time constraints, I will need to skip major portions of my prepared remarks. I encourage your questions and comments, as they will help me focus on the particular topics of greatest interest to you.

Extensive Committee Notes are found in House Document 103-74 at pp. 132-325 following each amendment, and will not be repeated here. These Notes provide a detailed explanation of the changes, and were revised to take account of the changes made by the Standing Committee on Rules of Practice and Procedure or by the Judicial Conference of the United States.

References in these remarks are to the pages of House Document 103-74. The Subcommittee should be aware, however, that, unlike the Committee Notes, my cover letter of May 1992 (at pp. 116-31) does not reflect changes later made by the Standing Committee or technical amendments previously submitted to the Standing Committee,¹ and the Standing Committee's Report (at pp. 112-15) does not reflect changes later made by the Judicial Conference.²

I. NON-CONTROVERSIAL CHANGES

Many of the amendments appear to be without substantial controversy, including amendments to 18 rules, 1 new rule, amendments to 4 forms, 2 new forms, and the abrogation of 1 old form. Given the time constraints, I may skip my prepared comments on them, but will be pleased to discuss any of them in detail (or by supplemental written report) if desired by the Subcommittee.

Rule 1: This amendment, essentially hortatory, stresses that attorneys share with the court the responsibility to see that the civil litigation is resolved not only fairly, but also without undue costs or delay. This is consistent with the aims of the Civil Justice Reform Act of 1990.

Rules 4, 4.1, 12, 15, 71A; Forms 1A and 1B: The most obvious change made by these amendments is the reorganization of the provisions of Rule 4 for greater clarity, placing some of the provisions into new rule 4.1. The provisions permitting mailing of an "acknowledgment of service" under former Rule 4(c)(2)(C)(ii) have, for greater accuracy, been recast under Rule 4(d) as ones permitting the sending of a "request for waiver" of formal service of process. Rule 4 has been made more forgiving of errors in attempting service, either when suing the United States or when there are delays in effecting service. To conform to these changes, Rules 12, 15, and 71A have been slightly modified, and new Forms 1A and 1B approved (replacing old Form 18).

¹ Particular note should be made of the changes by the Standing Committee in proposed Rule 11, providing that sanctions for Rule 11 violations will be discretionary rather than mandatory, and clarifying that Rule 11 will not be violated merely by the passive failure to withdraw a previously filed paper. The Standing Committee also returned proposed changes in Rules 83 and 84 to the Advisory Committee for further study in the light of similar changes being considered by other Advisory Committees. Please note also that the cover letter had addressed proposed changes in the Federal Rules of Evidence, one of which (Rule 702) was recommitted to the newly formed Advisory Committee on the Rules of Evidence.

² The Judicial Conference rejected the proposal to amend Rule 56 and accepted, on a post-meeting recommendation from the Standing Committee, a proposal to eliminate the potential for cost-shifting under Rule 4 in cases with foreign litigants.

As highlighted in the Committee Note, I specifically call Congress' attention to the provisions of new Rule 4(k)(2), which will permit federal court process to be served in a limited number of cases where previously, due to a gap in the rules, service was not possible. This change corrects the deficiency noted by the Supreme Court in *Omni Capital Int'l v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97, 111 (1987).

Rule 5: This change will permit—if authorized both by the particular district court and by the Judicial Conference—documents to be transmitted for filing by both facsimile and other electronic means.

Rule 16: These changes will enhance a district court's ability to meet its responsibilities under the Civil Justice Reform Act of 1990 in eliminating unnecessary costs and delays. I view the amendments as largely non-controversial. In fairness, however, I should note that, since a few of the modifications complement changes in Rule 26, some critics of Rule 26 have likewise opposed the amendments in Rule 16. Even if legislation were to be enacted suspending the effective date of the initial mandatory disclosure requirements of Rule 26(a)(1), the changes in Rule 16 need not be postponed (if, that is, districts were still permitted to adopted disclosure requirements as part of their local CJRA plans).

Rule 38: This technical amendment eliminates an arguable inconsistency between Rule 38(b) and (d), and provides that a demand for jury trial must be both served and filed within the time specified in the rule.

Rules 50, 52: These are technical changes to eliminate ambiguities in the rules that became effective December 1, 1991. The amendments make clear that judgment as a matter of law is a procedure available both to plaintiffs and to defendants.

Rules 53, 72, 73, 74, 75, and 76; Forms 33, 34, and 34A: These are technical amendments to conform to statutory changes under the Judicial Improvements Act of 1990, which changed the title of "Magistrates" to "Magistrate Judges" and modified the provisions for parties to consent to trials by a Magistrate Judge.

Rules 54, 58: New Rule 54(d)(2) establishes a uniform procedure for presenting requests for attorneys' fees under statutes calling for awards to prevailing parties. It should displace the myriad of local rules adopted following *White v. New Hampshire Dep't of Employment Sec.*, 455 U.S. 445 (1982). Amended Rule 58 provides an optional procedure that, when appropriate, can avoid the necessity of dual, separate appeals relating to the merits of a case and the award of attorney's fees.

Form 2: This is a technical revision to make the form consistent with statutory changes in 28 U.S.C. 1331 and 1332 affecting jurisdiction of federal district courts.

II. SANCTIONS AND RULE 11

The extent to which I will orally present my prepared remarks regarding the amendment to Rule 11 will depend upon the time allotted and the nature of expected presentations by others before the Subcommittee. Although the proposals to amend Rule 11 generated substantial controversy, many of the objections were obviated by changes to the published draft made by the Advisory Committee or the Standing Committee.

Procedural History

The Advisory Committee approached the possible modification of Rule 11 with special care, since major changes had been made in 1983 and many of the criticisms appeared to be ones resolved during a period when both litigants and courts were learning its implications and limitations. Although criticism of the 1983 rule was widespread, repeated, and intense, we were reluctant to rely on anecdotal comments and were mindful that aberrant decisions, often corrected on appeal, might mask major benefits to the judicial system fostered by its "stop-and-think" mandate to litigants.

The Committee's first steps were unusual ones in the rule-making process. One step was to call for comments, particularly from lawyers and litigants, addressing a series of questions before any change was proposed. We also requested that the Federal Judicial Center undertake two extensive studies, one involving the use and resolution of Rule 11 motions in five district courts and another involving a survey of attitudes by federal district judges.

After reviewing these comments and studies, and after hearing orally from some of the major protagonists in the debate, the Committee concluded that, indeed, there were good reasons to consider some changes in Rule 11 and prepared a draft that attempted to address and remedy the problem areas that seemed most legitimate and significant. The Standing Committee authorized publication and a period for comment.

A summary of the major areas of controversy that emerged from the written comments and from those presented orally during two separate hearings is outlined at

pp. 120-22 of House Document 103-74. As indicated in that summary, the Advisory Committee made a few changes from the published draft and submitted the proposed change to the Standing Committee. As noted on p. 114 of House Document 103-74, the Standing Committee made two changes in the proposed amendment of Rule 11: first, that imposition of sanctions for a violation of the rule should be discretionary, not mandatory; second, that the language should clearly indicate that a mere passive failure to withdraw a document would not constitute a Rule 11 violation.

Rule 11, as so amended by the Standing Committee, was approved by the Judicial Conference of the United States and then adopted by the Supreme Court, with two justices (Scalia and Thomas) dissenting.

Issues

Given the numerous modifications contained in the new rule, I am unsure what concerns may be expressed to Congress regarding Rule 11. I urge the Subcommittee to read the Committee Note accompanying Rule 11 (pp. 180-89), which explains in detail its various provisions.

I assume there will be some who, like Justices Scalia and Thomas, will contend that, although some of the changes may be worthwhile, the amendments may render Rule 11 "toothless" and thereby eliminate "a significant and necessary deterrent to frivolous litigation." Their dissent (pp. 104-07 of House Document 103-74) focuses on three of the changes: the "safe harbor;" making imposition of sanctions discretionary, rather than mandatory; and disfavoring compensation for litigation expenses as a sanction.

Justice Scalia accurately observed that the combination of elements in the new rule should reduce the number of Rule 11 motions presented to the court. Indeed, this is one of the principal aims of the revision, and we believe the FJC studies amply support our conclusion that there has been an excessive and unproductive amount of Rule 11 activity. To be sure, the "safe harbor" will reduce the risks to a litigant for initially including a questionable claim or defense. On the other hand, amended Rule 11 will continue to deter—and, in fact, more effectively and equitably deter—the *pursuit* of frivolous litigation, claims, and defenses. The "safe harbor" provisions, coupled with the proscription against the continued assertion of contentions that can no longer be justified, should actually result in more frequent abandonments and withdrawals of frivolous contentions than the prior rule. It should be noted that the "safe harbor" applies only to party-initiated motions; these provisions will not prevent court-initiated sanctions, which would be appropriately invoked by the more egregious violations that burden or offend the court.

Whether imposition of sanctions should be discretionary or mandatory is a question that has troubled and divided both the Advisory Committee and the Standing Committee.³ Those favoring mandatory sanctions generally express the concern that, if discretionary, sanctions will be imposed less frequently due to judges' natural reluctance to punish those who appear before them. Those favoring discretionary sanctions note that the mandate is largely illusory since the judge has wide discretion in selecting what sanction to impose, and that, indeed, explicit discretion to decline imposition of sanctions is needed in order to deal with the problem of Rule 11 motions that raise technical, insignificant violations. Influenced greatly by the disruption often caused by Rule 11 motions, the Standing Committee concluded that, on balance, a discretionary standard was preferable, and this is the form of the rule approved by the Judicial Conference and adopted by the Supreme Court.

The Scalia dissent correctly notes that the restrictions on monetary sanctions payable directly to movants will decrease the incentive for parties to file Rule 11 motions. This represents a conscious choice by the drafters. Too often, Rule 11 motions have been filed in an effort to circumvent the standards for statutory awards of attorney's fees to prevailing parties or to shortcut the procedures that would apply in traditional malicious prosecution actions. We believe that the principal purpose of Rule 11 should be to deter improper representations to the court which offend the integrity of the judicial process, and that parties should not be encouraged to file Rule 11 motions to obtain some personal benefit. At the same time, however, the amended rule does not discourage parties from preparing Rule 11 motions; service of meritorious Rule 11 motions should result in withdrawal or abandonment of frivo-

³ As mentioned in the Scalia dissent, the language of Rule 37, unlike that of Rule 11, continues to treat sanctions for discovery abuses as mandatory. This difference can perhaps best be explained by noting that the mandatory language of Rule 37, which long predated the 1983 revision of Rule 11, produced very few complaints. This in turn may be due to the fact that monetary awards under Rule 37 have typically been limited to expenses resulting from some particular discovery abuse, and not the shifting of the entire cost of litigation to another party.

lous claims or defenses, and, if court action is needed to accomplish that result, the fees incurred in presenting the motion may be reimbursed.

The most vigorous opposition to the proposals to amend Rule 11 came, however, not from those concerned about possible weakening of the rule, but from those who believed the changes did not go far enough—that Rule 11 should have been either abrogated altogether or restored to a form comparable to the pre-1983 language. We are convinced, however, that, despite its deficiencies and problems, Rule 11, as amended in 1983, has served a prophylactic purpose in calling on litigants to “stop and think” before asserting unsupportable contentions. According to the FJC survey, the great majority of district judges believe that Rule 11—perhaps more as a result of its in terror em effect rather than in the actual imposition of sanctions—has been a valuable tool, albeit less effective than some of the other management techniques available to the courts. The Advisory Committee believes that, with appropriate changes, Rule 11 can and will continue to serve an useful role in combating litigation abuses.

The plaintiffs’ civil rights bar was especially vocal in asserting that the 1983 version of Rule 11 had been used by defense counsel and some courts to “chill” the development of potentially meritorious, yet untested and novel, claims. We believe their concerns have been adequately addressed and remedied in the amended rule, which includes some changes made by the Advisory Committee and Standing Committee after publication of the original proposal. In addition to the protection afforded by the “safe harbor” provisions, Rule 11(b) places plaintiffs and defendants on a more equitable footing with respect to their obligations, and Rule 11(c)(2), relating to the type of sanction to be imposed, should avoid the unduly punitive sanctions occasionally imposed. Of particular note is the recognition in Rule 11(b)(3) that sometimes a plaintiff will have a legitimate basis for believing that some claim can be pursued but will need discovery from a defendant or third-parties to obtain factual support for that claim.

One additional matter may draw comment—the so-called “pleading as a whole” concept. Some may argue that a sanction should be imposed only if the pleading, taken as a whole, violates the certification requirements. The Advisory Committee was convinced, however, that the mere fact that some contentions in a complaint, answer, or brief have arguable merit should not absolutely excuse the inclusion and active pursuit of other contentions that were made for improper purposes, without any evidentiary support (existing or potentially obtainable through discovery), or without colorable legal merit. At the same time, the Committee agrees that parsing a document for every statement possibly subject to challenge under Rule 11 should not be encouraged. The proper balance, we believe, is achieved through the “safe harbor,” the adoption of a discretionary standard, and the elimination of the incentive for personal gain. Moreover, in the Committee Note we have included an admonition that Rule 11 motions should not be used for minor, inconsequential violations and that, in deciding what sanction—if any—to impose, the court should consider whether the violation infects an entire pleading or only one count or defense.

III. DISCOVERY AND DISCLOSURE: RULES 26–37 AND FORM 35

At the same time the Brookings Institute was reviewing the causes and potential remedies for unnecessary expense and delays in litigation—a study that would ultimately provide the impetus for enactment of the Civil Justice Reform Act of 1990—the Advisory Committee was also exploring what changes might be made in the rules to reduce these expenses and delays. Legislation proceeded more rapidly than did consideration within the judicial branch, in part due to the lengthy time requirements imposed under the Rules Enabling Act.

The changes in Rules 26 through 37 represent the considered judgment of the Advisory Committee on Civil Rules and the Standing Committee as to what amendments should *now* be made—with the specific objective that these changes complement and enhance the process of further exploration and experimentation mandated by the CJRA. These amendments were reviewed and approved by the Judicial Conference of the United States and then adopted by the Supreme Court. The deliberative process has been lengthy and time-consuming. Extensive oral and written comments from members of the bench, bar, and public were carefully considered, and in numerous instances resulted in changes to the proposals initially published.

Two fundamental propositions have guided the development of these amendments:

Attorneys, under active supervision from district and magistrate judges, must become more restrained, selective, and efficient in conducting discovery. Unrestricted discovery too often results in unnecessary expense and

delay. Many of the typical discovery disputes can be eliminated. Much of the information currently gained through the process of formal discovery requests, objections, and responses could be obtained more efficiently by less formal means without sacrifice to our adversarial system.

In due course as the CJRA contemplates, local experimentation and variation should be replaced by a return to uniform procedural rules. Meanwhile, the national rules must not interfere with, but rather should complement and enhance, these local experiments and variants.

The key features of the amended rules are outlined below. These are intended to apply only in cases that may involve evidentiary trials and require some discovery, and not, for example, in social security reviews, bankruptcy appeals, and similar cases typically decided on a written record.

(1) Early in the case, the attorneys must meet in person to explore and clarify the issues, discuss the discovery needs and attempt to agree on a proposed discovery plan, and submit a report of their proposals to the court for use in formulating a scheduling order. This should ordinarily occur before they commence formal discovery—in essence, an obligation to “stop and think” before rushing into discovery. Some cases, such as prisoner pro se litigation, would be excluded from this requirement.

(2) Limits should be imposed on the number of interrogatories and depositions in the case. The rules set a presumptive limit of 25 interrogatories and 10 depositions-per-side, but these may be changed by local rule, court order, or stipulation. Optionally, the court may also place limits on the length of depositions.

(3) Core information about a case—basically, the identification of potential witnesses and a general description of potential documentary evidence—should ordinarily be exchanged without going through the wasteful process of cross interrogatories, objections, and responses. This core information, disclosed early in the litigation, would be used as a basis for making better decisions regarding who should be deposed and what document requests should be made. Details concerning what information, in what cases, when—and, indeed, whether—this disclosure should be made are subject to modification by local rule, order in the particular case, or the parties’ stipulation.

(4) Times should be set for the parties to disclose—without need for interrogatories—information about expert testimony they expect to offer in the case. For specially retained experts, this disclosure should ordinarily be in the form of a written report detailing the testimony to be given on direct examination, with an obligation to update this report in advance of trial if there are any material changes. After receiving an expert’s report, a party may depose the expert without having to obtain special permission from the court.

(5) The time spent by litigants and judges on discovery disputes will be reduced through a series of changes, such as: (i) requiring responses to interrogatories and document requests to the extent not objectionable; (ii) restricting “speaking objections” and directions not to answer during depositions; (iii) providing the parties with expanded opportunities to vary discovery procedures without having to obtain court approval; and (iv) requiring that the parties try to resolve discovery disputes before presenting them to the court.

(6) Shortly before trial, the parties should list the witnesses to be called and the exhibits to be offered (other than purely for impeachment purposes). Objections to exhibits (other than under Rule 402 or 403) should be raised before trial or be waived.

(7) Virtually all of the amendments expressly permit modification by the district court through local rule or case order or, unless restricted by the court, by stipulation of the parties. These provisions are intended to make accommodation for local variants adopted by courts under their CJRA plans, and, in general, to highlight that the best discovery plans are those tailored to the particular circumstances of a given case. Even with highly-structured differential tracking plans, consideration should be given to any special needs of the case.

It is the third of these items—often referred to as “automatic mandatory early disclosure”—which has generated most of the controversy. I will focus my comments on this item, and particularly on the objections thus far made to the Subcommittee, except as you want me to address other aspects of the amendments.

The objection that early disclosure requirements will be counterproductive, resulting in increased costs by adding another layer of discovery disputes

This concern—stressed in the Supreme Court dissent, in which Justice Souter also joined—is a legitimate and potentially meritorious objection. The Advisory Commit-

tee would have to acknowledge that many—perhaps most—of those drawn into the debate by the principal critics are, in good faith, genuinely concerned that the disclosure obligations will breed a new arena for unproductive pretrial disputes; and, quite candidly, we cannot say with certainty that their fears are unfounded. We believe, however, that their apprehensions will prove to be greatly exaggerated and that experience will demonstrate that mandatory early disclosure of core information reduces the time and expense of discovery. While some disputes will doubtless arise concerning the disclosure requirements, particularly during the period when litigants and courts are adapting to the new rules, this burden should be more than offset by a reduction in the disputes arising from early interrogatories and subsequent discovery requests.

Critics approach the new rule by asking this question: can the disclosure requirements be used by a litigant, if permitted to do so by the court, to distort and frustrate the goal of reduced expenses and delay in the discovery process? My question is whether, under guidance by judges, attorneys can and will conform and adapt their traditional practices in a manner that will achieve the worthwhile objectives of the new procedure.

I am personally convinced that the critics are underestimating the ability of lawyers and judges to bring about these changes without generating a new round of disputes.⁴ I am not alone in this view, as evidenced by the fact that 23 of the 41 CJRA plans adopted as of June 1, 1993, include some variant of an early disclosure requirement, and many other courts are in the process of including such provisions in their plans. As the Subcommittee knows, these plans are developed on a local basis by members of the bench, bar, and public to reduce the expense and delays in civil litigation. While only anecdotal evidence, my conversations with judges and lawyers in districts that have already implemented disclosure obligations indicate that few disputes requiring court intervention have occurred in complying with those obligations.

A major area of debate relates to the timing and scope of early disclosures. Many have urged—and some district courts have provided in their CJRA plans—that parties should be required to disclose only those witnesses and description of documents which would be used to support their positions in the case and that these disclosures should be made sequentially, first by the plaintiff and then by the defendants. Some plans, using language contained in the initial published draft of the proposed change, call for disclosure of witnesses and document descriptions that bear significantly on the issues in the case. Some plans call for actual production of documents, rather than merely a description.

Based upon the numerous comments, the Advisory Committee concluded that the best balance—between the information likely to be needed and the potential for disputes—was to call for essentially simultaneous exchange of the core information (at or following the in-person meeting of counsel) and to use traditional concepts of relevancy in defining the scope of information to be disclosed.

One refinement, prompted largely by defendants concerned about vague allegations sometimes contained in notice pleading, was to link the presumptive scope of disclosure obligations to the disputed facts identified with particularity in the pleadings. Also, the rule, as ultimately submitted to and adopted by the Supreme Court, requires an early meeting of counsel to discuss and clarify the issues in the case, with the expectation this discussion should eliminate most of the controversies that might otherwise arise concerning the scope of disclosures.

There is no one right answer at the present time regarding how the initial disclosure requirements should be worded. For this reason—as well as to facilitate the mandates of the CJRA in calling for local experimentation—Rule 26(a)(1) expressly permits local courts to vary from the national standards for initial disclosure, or indeed even to “opt out” of any such requirement altogether during the present period of experimentation. Under the Civil Justice Reform Act, the Advisory Committee will have an obligation to review the experience of courts operating with different versions of disclosure requirements.

The objection that early disclosure, coupled with the provisions for sanctions and a duty to supplement, will result in unnecessary disclosure

Some argue that the potential sanctions for insufficient disclosures are too severe and may lead responsible litigants to “over-disclose.” Much of this criticism results

⁴The Committee Notes (at p. 228) stress that “the disclosure requirements should, in short, be applied with common sense and in the light of the principles of Rule 1, keeping in mind the salutary purposes that the rule is intended to accomplish. The litigants should not indulge in gamesmanship with respect to the disclosure obligations.”

from a failure to read the rules and Notes, or to recognize the changes made from the initial published draft.

The initial disclosure under Rule 26(a)(1)—whatever the scope of information specified in the national rule or a local rule or plan—is to be “based on the information then reasonably available to it;” and the signature on the disclosure constitutes under Rule 26(g)(1) a representation that “to the best of the signer’s knowledge, information, and belief, formed after reasonable inquiry, the disclosure is complete and correct as to the time it is made.” The Committee Note (pp. 229-30) emphasizes that the rule “does not demand an exhaustive investigation at this stage of the case, but one that is reasonable under the circumstances, focusing on the facts that are alleged with particularity in the pleadings,” and then indicates a variety of factors that might affect the type of investigation that should be expected.

Rule 26(e) imposes a duty to supplement this disclosure if the party “learns that in some material respect the information disclosed is incomplete or incorrect and if the additional corrective information has not otherwise been made known to the other parties during the discovery process or in writing.” This obligation is actually less demanding than the supplementation required by prior Rule 26(e)(1)(A) for interrogatories about persons having knowledge of discoverable matter, and is essentially the same as under prior Rule 26(e)(2) regarding document requests.

Criticism about the sanctions for violations of the disclosure requirements has been directed to Rule 37(c)(1), which provides that a party “that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1) shall not, unless such failure is harmless, be permitted to use as evidence any witness or information no so disclosed.”⁵ This potential penalty—precluding a party from offering at trial evidence not previously disclosed by it—hardly justifies any concern about “over-disclosure.” This is an entirely appropriate sanction if a party fails to make a disclosure required by the tolerant standards prescribed in Rules 26(a)(1) and 26(e)(1) and this failure is “without substantial justification” and causes harm to another party.

Rule 37(c)(1) recognizes that preclusion of evidence, as just discussed, is obviously no sanction at all if a party violation fails to disclose information harmful to its position in the case. The rule provides that other appropriate sanctions should be imposed in such circumstances, which “may include informing the jury of the failure to make the disclosure.” Unlike the original published draft, the rule does not mandate, but merely permits, this type of sanction, as is true now in the analogous situation of spoliation of evidence. Given the tolerant standards of Rules 26(a)(1) and 26(e)(1) and the need to show that the failure to disclose was both “without substantial justification” and harmful to another party, it is difficult to see why this potential sanction should somehow result in over-investigation and over-disclosure, any more than has this same potential sanction for concealment in answering interrogatories.

The objection that the national standard calls on defendants to disclose too much, too early

Though expressly subject to local variation as to scope and timing, Rule 26(a)(1) establishes a framework for disclosure that, in the Advisory Committee’s opinion, is not unfair to defendants, some of whom have complained that it calls for too much information, too early in the litigation.

The information required to be disclosed—and, more particularly, the identification of persons likely to have discoverable information and a general description of the types of relevant documents, whether or not supportive of the responding party’s position—is clearly information of the sort that courts have ordered provided when sought through interrogatories. Since 1970, Rule 26(b)(1) has declared to be discoverable “any matter, not privileged, which is relevant to the subject matter involved in the action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.” The matters to be disclosed under Rule 26(a)(1) represent, in fact, only a subset of the items that parties have long been permitted to obtain through interrogatories.

Nor does the rule advance the time when a defendant must supply this information. Under the prior rule, interrogatories and document requests could be served

⁵The complaints about possible sanctions for violation of the disclosure requirements have not generally cited the possible sanctions under Rules 26(g)(3) and 37(a)(4), as these are essentially the same as for failures to answer interrogatories.

with the complaint and a defendant was required to respond within 45 days after service. Under the amended rules, these discovery requests are not to be served with the complaint and the time for initial disclosure—unless altered by local rule, court order, or stipulation—is measured by reference to the times for scheduling orders and the meeting of counsel. In the typical case the defendant's initial disclosures would not be due until approximately 75 days after being served with the complaint. They would have significantly more time to produce records that might ultimately be sought through Rule 34 requests following the initial disclosure.

In short, defendants will have to disclose less information than they formerly could be required to provide, and will have more time to do so.

The objection that disclosure requirements will undermine an attorney's duty to the client

As noted, the national standard does not require disclosure of any matters that have not long been discoverable.⁶ Arguments that the disclosure requirements will somehow impinge on the attorney-client relationship take two forms: first, that an adversary—whether deliberately or negligently—may not ask for some or any of the information covered by the disclosure requirement; and second, that the attorney's role in helping to identify potential witnesses and types of documents which are "relevant" involves professional skills that should not result in benefiting an adversary.

In the situation where a conscious decision would be made by an adversary not to seek information subject to the disclosure requirement, the parties can, under the amended rules, agree that no such disclosure be made.

The more likely situation involves the negligent failure of an adversary to seek such information, typically by using words that provide the responding party with an arguable basis to avoid disclosing clearly relevant information. The desire of litigants to benefit from such errors is understandable, just as when litigants under common law pleading were more than happy to take full advantage of technical rules of pleading.

In fact, most of these errors are ultimately corrected—though with extra expense and delay—as the case proceeds towards trial. Through motions to compel or supplemental discovery requests, the information needed to fairly prepare for trial is usually obtained. In the few cases where this does not occur, there is a substantial risk of unnecessary confusion at trial or an unjust result, contrary to the spirit of Rule 1. We do not believe the attorney-client relationship is undermined by requiring the disclosure of core information needed by the parties to prepare properly for trial.

To be sure, lawyers will be using their professional skills in helping clients to identify information subject to the disclosure requirements. This they do now, when assisting in the preparation of objections and responses to formal discovery requests. They will not be called upon to do more than they have had to do under the former rules when similar interrogatories were asked, objections made, and an order entered requiring answers. What the amended rule does is to eliminate these three steps with respect to the four types of information described in Rule 26(a)(1), eliminating the cost and delay such procedures have regularly added to the litigation process.

The objection that criticism is widespread and that changes in the published draft should have resulted in republication and a new period for comments

Critics emphasize the extent of opposition from the bar and regular litigants. I do not minimize this opposition or fault the principal antagonists for their zeal and success in corraling support. The rule-making process must not, however, become captive to populist appeals or subjected to plebiscites, particularly when considering amendments that involve a balancing of competing interests. The Advisory Committee and the Standing Committee—each composed of judges, lawyers, and academics—must use their collective experience and judgment in evaluating procedures for use in a wide variety of civil cases in federal court, which affect plaintiffs, defendants, judges, and members of the public, not all of whom will see eye-to-eye on a given issue. We read or heard, and considered, comments from hundreds of individuals and groups, incorporating into the rules many of their suggestions. That many,

⁶There is one part of the disclosure requirements which may be viewed as expanding the scope of discoverable matters. Courts presently are divided as to whether testifying experts can be required to produce otherwise privileged or protected materials that they have considered in forming their opinions. Rule 26(a)(2) resolves this conflict, adopting the position that information considered by a testifying expert should be discoverable and that accordingly counsel should be cautious in furnishing their experts with materials they are unwilling to have disclosed.

whose views were solicited but not altogether adopted, continue to advocate their earlier positions is not surprising.

It is worth repeating that 23 of the 41 CJRA plans adopted as of June 1, 1993, include some form of early disclosure requirement and that many of the remaining 53 districts are planning to do so. These plans have been formulated through the deliberative efforts of diverse groups of judges, lawyers, litigants, and members of the public seeking to put aside their parochial or partisan views in the interest of reducing costs and delays in civil litigation.

Some critics have suggested that the various changes made by the Advisory Committee or Standing Committee to the published amendments to Rules 26-37—or at least the provisions the critics objected to—should have been republished, with an additional period for comments. There were a number of modifications made—for the better, we believe. These came as a result of suggestions made during the comment period, and none had the effect of enlarging the scope of the change to the existing rules or doing more than altering the specific language of concepts contained in the published draft. Republication was clearly not required by the applicable statutes or the procedures of the Judicial Conference that govern the rule-making process.⁷ To adopt the argument that under such circumstances republishing should be required would ultimately result in greatly diminishing the value of public comments, creating a major disincentive for making improvements suggested during the comment period.

Some mention should be made regarding the actions of the Supreme Court in adopting these amendments, and particularly the dissent of Justices Scalia, Thomas, and Souter, the concurrence of Justice White, and the transmittal letter of the Chief Justice. I take quite seriously, and have attempted to address, the various points made in the dissent. The institutional difficulties faced by the Supreme Court in fulfilling its statutory role respecting amendment of federal rules were highlighted in Justice White's concurrence and partly echoed, in more muted tones, by the Chief Justice in his transmittal letter. It should be noted that the same caveat from the Chief Justice was included in his letters transmitting changes in other sets of federal rules, whose adoption had provoked no dissent. The role of the Supreme Court in the rule-making process is the subject of legislation, which Congress may at any time reconsider. I would not, of course, presume to speak for the Supreme Court on this subject.

The objection that any disclosure requirements should await the results of local experimentation under the CJRA

This objection has two aspects: one has substance and is arguably meritorious; the other, as I view it, should be summarily rejected.

To the extent critics say that, because of the statutory requirement for a critique of local experiments under CJRA plans, all recognition at this time in the national rules of early disclosure should be eliminated or suspended, they are wrong. I am aware of suggested legislation that would, through deletion of Rule 26(a)(1) and rewording of other portions of the rule, eliminate all references to initial disclosure. This would be a very bad mistake. At least in some fashion, the rules that become effective on December 1, 1993, must give legitimacy to initial disclosure requirements in the CJRA plans, which all districts must adopt by that same date.

As noted, 23 of the districts have already included variants of early disclosure as part of their CJRA plans, and many others are planning to do so. Disclosure of core information without going through the process of interrogatories, objections, and orders compelling answers is—whatever the debates over scope, timing, etc.—a matter that must be explored and tried as a part of the CJRA mandate. Without some modification in the Rules of Civil Procedure, these experiments will be subject to unnecessary controversies in which litigants contend that local disclosure requirements contravene 28 U.S.C. 2071, and legislative rejection of disclosure requirements would doubtless be used as a basis for attacking the validity of local disclosure programs. Should legislation be enacted to delete or suspend the provisions for initial disclosure, it is essential, in order to complement the aims of the CJRA, that some approval be given for district courts to incorporate disclosure provisions in their plans.

Some critics no doubt will recognize the critical need that the national rules (or legislation) authorize local court adoption of disclosure procedures, but urge that, pending completion of the CJRA experiments, there be such an authorization coupled with provisions deleting or suspending the particular early disclosure format

⁷It may be noted that the four Justices commenting on the rules did not criticize the process which led to the submission to the Supreme Court.

contained in Rule 26(a)(1). This alternative was seriously considered and, at one point during the deliberative process, was viewed by the Advisory Committee as the approach to take. At that stage, new language for Rule 26(a)(1)—with complementary changes in other related rules—was developed that would authorize courts to adopt early disclosure plans, but without indicating any particular suggested framework for disclosure.

As Justice Scalia and others have observed, the Advisory Committee later changed its position and returned to a system of prescribing an early disclosure format, but with explicit authorization for modification by local rule, court order, or stipulation. Why this reversal?

First, absent any suggested disclosure format in the national rules, too many local variants would likely emerge, complicating the Congressional mandate to review experience of courts under their plans.

Second, the particular disclosure provisions now contained in Rule 26(a)(1) are equitable, workable, and potentially beneficial. Given the time and energy expended in studying the comments regarding early disclosure, the Advisory Committee believes it should provide the various district courts with the benefit of its best judgment concerning a disclosure procedure.

Third, the success of a disclosure program will depend in part on education of the bench and bar, and incorporation of disclosure provisions into the national rules, even though subject to local variation, will facilitate that learning process. As an aside, I should note that, although few major disputes have thus far erupted in districts with disclosure requirements, part of the reason may be that often the parties have been unaware of their obligations under the local plans.

Though the judiciary was hardly an enthusiastic supporter of enactment of the CJRA, it is committed to using its best efforts to achieve the laudable goals of that legislation. It would be a mistake for Congress now to withdraw from the judiciary some of the tools needed to make that legislation work.

IV. VIDEOTAPED DEPOSITIONS: RULE 30(b)

Let me start on this subject by noting that the amendments relating to videotaping of depositions are not critical and could be eliminated without affecting the other changes in Rules 26–37. We do believe, however, that the changes affecting recording of depositions will be beneficial, reducing unnecessary court involvement and providing appropriate protection and safeguards for non-stenographic recording of depositions. Properly understood, the changes in Rule 30(b) will not adversely affect court reporters⁸ or the integrity of judicial processes.

If, however, your experience is similar to that of the Advisory Committee, you can expect to receive thousands of letters complaining of the changes, principally contained in amended Rule 30(b), relating to non-stenographic recording of testimony. Again, if our experiences are similar, much of this correspondence will be off-target, erroneously assuming that the amendments are aimed at eliminating court reporters from the recording of trial testimony. The amendments do *not* jeopardize or affect the role of court reporters during trials, and do not indicate any type of hidden agenda by the Committee to eliminate court reporters.

There are, however, those—and the Chairman of this Subcommittee may be one—who, though aware that the amendments relate only to recording of depositions, are nevertheless concerned, *inter alia*, over the potential for additional disputes when depositions are not recorded stenographically.

As a personal note, I want to affirm that I am not, in any way, a foe of court reporters. Trials before me are recorded by certified, qualified court reporters—typically using CAT technology, which can be used to rapidly produce written transcripts—and not by operators relying on audio recording devices. Relatively few non-stenographic depositions have been used in proceedings over which I was presiding. My secretary of over twenty years, who retired earlier this year, has a husband and son in the court reporting profession, and a second son who formerly was a court reporter. So far as I observed, none of the other members of the Advisory Committee wanted to eliminate court reporters, and many of us had experiences that made us mindful of the problems that can arise when non-stenographic depositions are used at trial or must be reviewed on appeal.

⁸Other amendments may adversely affect court reporters; namely, those calling for a reduction in the number of depositions and authorizing courts to impose limits on the length of depositions. So far as I am aware, however, there has been no overt opposition by court reporters to these provisions. It should be noted that still other amendments, particularly those in Rule 30(e), were made to reduce some of the problems typically faced by court reporters.

Amended Rule 30(b) will permit any party to decide whether a deposition should be recorded stenographically or non-stenographically. A party noticing a deposition can arrange for stenographic or non-stenographic recording, and any other party, dissatisfied with that selection, can arrange for another form of recording at its expense. The parties' decisions will, no doubt, be governed by considerations of cost, accuracy, and potential utility at trial. The rules include new provisions to assure the fairness of non-stenographic recordings, and require that a party expecting to use a non-stenographic recording at trial must provide the court and opposing counsel with a written transcript of the pertinent portions. This latter requirement is of special value to trial and appellate judges called upon to preview or review such depositions.

Formerly, non-stenographic recording of depositions required either the parties' stipulation or the court's approval. Requests for non-stenographic recordings, however, were routinely granted, unless there were special reasons to deny the request or, more frequently, disagreements between counsel regarding procedures to be followed at the deposition or in preparing a transcript. Most of these disagreements should be eliminated by the new safeguards incorporated into the amended rule and the opportunity to arrange for another method of recordings. The court is still available through a Rule 26(c) motion if serious controversies about recording cannot be resolved by the parties, but the rule will relieve judges from unnecessary involvement in such matters.

Some have suggested that the opportunity for multiple recordings of depositions will generate disputes over which recording is the more accurate. This has been a potential source for dispute under the prior rules, in which authorizations for videotaped depositions have often been accompanied by a requirement for simultaneous recording by a court reporter; but, so far as I am aware, such disputes have been practically non-existent. There are disputes when evidence is offered about a deponent's testimony through oral examination of a person present at the deposition, but there is no reason for the number of these disputes to increase under the new rules.

The controversy over Rule 30(b) has inappropriately, in my view, raised disputes as to the relative cost, accuracy, and value of stenographic transcriptions versus non-stenographic recordings. This is not the time to attempt to resolve this debate. Rule 30(b) does not favor one form of recording over the other, and leaves counsel free—subject to court review on motion—to select the particular form they prefer. With the increasing use by court reporters of equipment incorporating the latest technological improvements, we can expect their professional, independent services to be valued by judges and lawyers even more than at present.

V. CONCLUSION

I urge Congress to resist the pressures for legislative intervention and to permit the rules to take effect on December 1, 1993, as scheduled.

Should, however, legislation be seriously considered, special care must be taken in the drafting. Due to the interrelationship of provisions in different rules, or different parts of the same rule, even minor changes can produce inadvertent inconsistencies or conflicts.⁹ If legislation is to be proposed and pursued—and I hope it will not be—I will be happy to work with the Subcommittee and its staff in an effort to avoid such drafting errors.

Mr. Chairman and members of the Subcommittee, I thank you for your attention during this presentation and will be pleased to respond to your questions.

Mr. HUGHES. Judge Schwarzer, welcome.

STATEMENT OF WILLIAM W SCHWARZER, SENIOR U.S. DISTRICT JUDGE, U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, AND DIRECTOR, FEDERAL JUDICIAL CENTER

Judge SCHWARZER. Thank you, Mr. Chairman, members of the committee. I appreciate the opportunity to appear before you.

⁹For example, to eliminate the controversial provisions relating to non-stenographic recording of depositions cannot be accomplished merely by rejecting the amendment of Rule 30(b). Rather, the amendments of both Rule 30(b) and 30(c) would both have to be rejected, accompanied by the abrogation of former Rule 30(b)(2).

I should add I appear in my individual capacity. My comments will be brief and will be limited to the amendments relating to the discovery process under the rules.

There seems to be wide agreement that the present process under the discovery rules is not working in a satisfactory manner. It may not be a problem in every case and it may not be a problem implicating every lawyer, but the experience generally of lawyers and judges has been that there is too much discovery, that it becomes disproportionate to what is at stake in the lawsuit, and that it is too adversarial.

Some lawyers contend that that argues for greater involvement by individual judges, greater judicial control. But the fact is that judicial time is a very limited resource, and the primary responsibility for this process has been and has to be on attorneys. It is their responsibility to make the discovery system work.

The amendments to rules 26 and 30 recognize the primary responsibility of lawyers. Those amendments ask lawyers to do what could reasonably be expected of them, and that is to disclose core information in the case without adversary proceedings about that disclosure, and to focus their discovery so as to avoid unnecessary depositions and other discovery activity, which is what the early disclosure is intended to lead to as well as the presumptive limitation on the number of depositions.

Some people have argued that the way to deal with excess discovery is by the use of sanctions. But sanctions, except in extreme circumstances, tend to be counterproductive.

What amended rule 26 does instead is to take a constructive approach by mandating an early conference of the lawyers concerning disclosure and their plans for discovery. And that may be in the long run the most important contribution that this amendment will make, because when attorneys communicate with each other, as they often fail to do early in the litigation, problems become manageable or go away. They are able to identify issues in the lawsuit, to narrow those issues, to focus the discovery on those issues that are genuinely in dispute, and to work out the kinds of problems that you may be hearing about that might arise in the course of disclosure; problems that for that matter arise now in the course of discovery.

So taking the amendments that are before you, together they represent a very constructive approach to try to make this system work better.

As has been pointed out, of course, the amendments really advance the purposes to which Congress has already subscribed in the Civil Justice Reform Act, that is, to promote a more efficient and less time-consuming process for discovery.

Twenty districts already are using some form of disclosure, and these amendments will enable them to introduce flexibility into their processes. Some have argued that there ought to be a period of experimentation, but the fact is that this amendment to rule 26 contains opt-out provisions. A court can opt out, a judge can opt out or the parties can opt out by stipulation. So in effect it opens the door to wide experimentation and alternative ways of approaching these problems and dealing with them.

Thank you very much.

Mr. HUGHES. Thank you, Judge.

[The prepared statement of Judge Schwarzer follows:]

PREPARED STATEMENT OF WILLIAM W SCHWARZER, SENIOR U.S. DISTRICT JUDGE, U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, AND DIRECTOR, FEDERAL JUDICIAL CENTER

My name is William W Schwarzer. I am a Senior United States District Judge for the Northern District of California and the Director of the Federal Judicial Center. I served as a judge of the United States District Court for the Northern District of California from 1976 until 1990 when I assumed my present duties as Director of the Center. From 1952 until 1976, I engaged in the practice of law, specializing in civil litigation.

This statement was prepared in response to a request from the Honorable Jack Brooks, Chairman of the House Judiciary Committee. I appear in support of the proposed amendments to the Federal Rules of Civil Procedure. My statement addresses specifically the amendments to Rules 11, 26 and 30.

RULE 26

The primary purpose of the amendment to Rule 26 is to reduce the cost and delay of litigation generated by excessive discovery activity. A secondary purpose is to stimulate early communication among the parties and judicial intervention, leading to narrowing of issues and earlier settlements. There is virtually no disagreement that discovery often gets out of hand—in the sense that discovery costs are disproportionate to what is at stake—generating expense as well as delay that can make it uneconomical to litigate legitimate claims and defenses. The amendment of Rule 26 takes a modest step toward reducing and focusing discovery activity through certain pre-discovery disclosure. Requiring parties to disclose at the outset of the lawsuit the identity of persons having relevant information and of documents containing relevant information, as well as the computation of damage claims and insurance agreements, will help the court and the parties to identify the critical issues of fact and law more quickly, will obviate some discovery activity and make other activity more efficient, and will facilitate earlier settlements.

There has been considerable opposition to the concept of disclosure. As other witnesses will testify, the Advisory Committee gave careful consideration to the opponents' arguments and made substantial changes in earlier drafts to accommodate legitimate concerns. To a large extent, I believe, the remaining opposition is grounded on a misunderstanding of the way in which the amended rule will operate. To a lesser extent, it may represent reluctance on the part of lawyers to change settled ways of practicing their profession. While change for the sake of change is not to be encouraged, where discovery is concerned, the old proverb—if it ain't broke, don't fix it—does not apply and change is badly needed. I am convinced, for the reasons stated below, that once the bench and the bar become accustomed to the disclosure procedure, the objectionable features of discovery—excessive adversariness and overuse of discovery resulting in unnecessary cost and delay—will be ameliorated.

The amendment furthers the objectives of the Civil Justice Reform Act of 1990 which include "early involvement of a judicial officer in . . . controlling the discovery process," "the encouragement of cost-effective discovery . . ." and "explor[ing] the parties' receptivity to, and the propriety of, settlement or proceeding with the litigation." (28 USC following 471, 473(a)(3)(A) and (4)). Approximately 20 districts have already implemented mandatory pre-discovery disclosure in one form or another in their civil justice expense and delay reduction plans adopted pursuant to the Act and early reports indicate that it is working well.

Attached to this statement is a copy of an article shortly to appear in the Georgia Law Review (27 Georgia Law Review, no. 3, June 1993) in which I have addressed the arguments advanced by opponents of the amendment. In substance, the opponents argue that the disclosure process will require attorneys to do extra work, will create confusion over what needs to be disclosed resulting in additional disputes and litigation, and will create conflicts with their ethical obligations to their clients. These objections can be readily disposed of.

The obligation to disclose the identity of knowledgeable persons and relevant documents arises only with respect to facts "alleged with particularity." For example, a general allegation that a product with multiple components is defective in some unspecified manner would not without more trigger an obligation to search for and disclose persons possibly involved in or documents affecting the design and production of that product. The obligation to make disclosure is proportionate to the specificity and clarity of the allegations; attorneys have no obligation to search out wit-

nesses and documents to support vague, generalized allegations, and the rule does not require them to conduct any investigations beyond those required by professional standards and Rule 11. Disclosure, moreover, is not required until after counsel have held the mandatory conference under Rule 26(f) to identify the issues and develop a plan for disclosure and discovery. If further clarification of the disclosure obligation in the particular case is needed, it can be had at the mandatory Rule 16 scheduling conference with the judge which follows promptly. And attorneys have no obligation to produce any information or documents that they would not have to produce under the existing discovery regime if the proper request is made; the effect disclosure is expected to have is to eliminate the adversary maneuvering and the cost and delay that now surround such requests.

The amendment will not interfere with the attorney-client relationship. Rule 26(b)(5) specifically allows parties to assert the work product and privilege rules before disclosure is required. The rule requires nothing to be disclosed that could not now be discovered. And because the disclosure obligation is limited to matters relevant to facts alleged with particularity, it does not call on attorneys to search their files and use their ingenuity for the purpose of making a case for their opponent. Some have said that disclosure may encourage parties—and possibly lawyers—to cheat and hide damaging information. But that option is equally available to them when called on to disclose damaging information in depositions or interrogatories.

Opponents argue that in large and complex cases, disclosure would impose intolerable burdens and would be impractical. The rule recognizes that some cases may require procedures tailored to their circumstances—not only large cases but also small cases in which disclosure is unnecessary. With this in mind, the rule provides that a different procedure may be established by order, local rule or stipulation of the parties. The amendment is aimed at the bulk of the civil litigation in the federal courts which involves relatively small financial stakes—small enough to create the risk that uncontrolled discovery would make the litigation uneconomical. Controlling the cost of discovery will enhance access to justice for civil litigants.

Opponents also argue that disclosure would undermine the adversary process. In fact, the present discovery process leads to abuse of the adversary process because it operates largely without control or oversight. What has become common practice—to obstruct, harass, and interfere with one's opponent in discovery—is now sanctified as a part of the adversary process. That process, intended to further the search of truth, is often used in discovery to subvert that objective. Disclosure should remind attorneys of their professional obligation as officers of the court.

The amendment of Rule 26 also makes changes in discovery directed at experts, disclosure of expert reports, foreign discovery, and claims of privilege. In their present form, none of these appear to be generating significant controversy.

RULE 30

The amendment to Rule 30 carries forward the purpose underlying Rule 26 by measures intended to reduce the cost and delay engendered by the overuse—and sometimes misuse—of depositions. Rule 30(a)(2)(A) imposes a presumptive limit of ten depositions per side. Additional depositions may be taken with leave of court. The rule does not impose a time limit on depositions, but Rule 26(b)(2) gives judges specific authority to limit both the length and the number of depositions. A presumptive limit—coupled with disclosure—should lead attorneys to avoid excessive deposition activity by focusing on key witnesses and key issues. Early identification in the litigation of knowledgeable persons and relevant documents will help to avoid unnecessary depositions and make those depositions that are taken more efficient.

The amendment to Rule 30(d) should reduce misuse of depositions by, among other things, codifying lawyers' obligation to refrain from abusive tactics, such as speaking objections and inappropriate instructions not to answer questions. These tactics are used to prolong and obstruct depositions, frustrating effective discovery and often causing substantial costs.

The principal controversy surrounds Rule 30(b)(2) which permits a party to take a deposition by non-stenographic means without leave of court. Unless the court orders otherwise, a deposition may be recorded at the taking party's option by sound, video, or stenographic means at its expense. Any party may make its own arrangements for stenographic transcription and may also obtain a transcript of the deposition taken by non-stenographic means. While opponents argue that audio and video recordings are unreliable¹ and difficult to use in court, their objections are ade-

¹On this point note that the Center has studied the cost, reliability, accuracy, and ease of use of the audio tape recording of court proceedings in comparison to stenographic recording of such proceedings and concluded that "[g]iven appropriate management and supervision, elec-

quately addressed by the provision requiring a party wishing to use a deposition in court to furnish a transcript to the opponent, as well as giving any party the right to have its own stenographic transcript made at the deposition.

Much of the opposition to this proposed rule comes from court reporters. The current rule favors court reporters in that it requires either a stipulation or a court order before any non-stenographic means can be used to record a deposition. The effect has been to create a banter to other technologies that might compete with stenographic reporting. Because lawyers will control the means by which a deposition will be recorded, the proposed rule contains built-in market limits. If audio and video depositions are unreliable and difficult to use in court, lawyers will not use them. If, however, they are reliable, accurate, and cost-effective, they will serve the purpose of the proposed rule and perhaps reduce one of the major costs of litigation.

Experience indicates that only a fraction of the depositions taken are ever used at trial, and even then principally for potential impeachment of a witness. Freeing parties of the obligation to have every deposition stenographically transcribed will enable them to avoid substantial expense which for the most part is wasted.

RULE 11

The amendment to Rule 11 represents the Advisory Committee's effort to incorporate some lessons of experience under the present rule and to meet some of the persistent objections that have been made to it. The committee recommended the amendment to Rule 11 only after extensive study of existing practice and input from the public and the legal and academic communities. The committee began its review in 1989 and by 1990 had called for written comments about the rule and asked the Federal Judicial Center to undertake an empirical study of the operation and impact of the rule. Center staff presented a preliminary report on its study to the Advisory Committee at the committee's February 1991 meeting. In conjunction with the February meeting, the Advisory Committee also held a hearing at which various interested parties (chiefly opponents of Rule 11) were invited to testify. The Center's final report was presented to the committee at its May 1991 meeting. After considering written comments, testimony, and empirical evidence, the committee drafted a proposed revised rule and then received written comment and held two hearings on the proposed revised rule before making its final recommendation to the standing committee.

Principal revisions to the rule include expanding its reach to cover advocating or reaffirming legal and factual contentions that were initially made in writing after they are no longer tenable and the creation of a "safe harbor"—the provision that notice and an opportunity to withdraw an offending contention must be given before a motion for sanctions may be filed. The revised rule also states that the sanctions imposed should be limited to what is sufficient to deter repetition of the conduct or comparable conduct by those similarly situated, emphasizes that sanctions may be either non-monetary or monetary, and limits the circumstances under which monetary sanctions may be imposed.

Reasonable minds may differ with respect to the need for and desirability of the various changes in the rule. What is important is that the changes do not reflect a retreat from the basic proposition that papers that are frivolous or have an improper purpose are not acceptable in the federal courts. The rule continues to require attorneys and pro se litigants to "stop and think" before making legal and factual contentions. It is true that, as revised, the rule provides that the court *may* not *shall* as under the present rule, impose sanctions on finding a violation, but as a practical matter the imposition of sanctions has been very much a matter of the trial court's discretion, and the amendment simply recognizes the reality.

tronic sound recording can provide an accurate record of United States district court proceedings at reduced costs, without delay or interruption, and provide the basis for accurate and timely transcript delivery." J. M. Greenwood et al., A COMPARATIVE EVALUATION OF STENOGRAPHIC AND AUDIOTAPE METHODS FOR UNITED STATES DISTRICT COURT REPORTING at xiii (Federal Judicial Center 1983).

IN DEFENSE OF "AUTOMATIC DISCLOSURE IN DISCOVERY"—

WILLIAM W SCHWARZER*

[*Senior United States District Judge and Director, Federal Judicial Center. The views expressed are the author's and do not necessarily represent those of the Center or its Board. Alan Hirsch assisted in the preparation of the article.]

In the Fall 1992 issue of this Review, three distinguished authors vigorously opposed the disclosure provisions of the proposed amendment of Rule 26 of the Federal Rules of Civil Procedure.¹ Their article is thoroughly researched and well-written but, I submit, fails to tell the whole story. In this response, I will analyze the five major propositions the authors advance in support of their argument that the proposal is flawed and draw attention to important aspects of the proposal that are relevant to whether it should be adopted.

- I. THE DISCLOSURE STANDARD WILL APPLY TO ALL TYPES OF CIVIL LITIGATION, FROM SIMPLE COLLECTION CASES TO PATENT, SECURITIES, AND ANTITRUST CLAIMS. THE ONLY WAY TO FRAME A STANDARD COVERING SUCH A BROAD RANGE OF CASES IS TO USE THE BROADEST, MOST NON-SPECIFIC TERMS²

This argument proves too much. The federal rules are, and always have been, transsubstantive and applicable to all categories of cases. Discovery in all cases has been governed by a single standard—requests must be relevant to the subject matter and calculated to lead to the discovery of admissible evidence. And that standard would continue to govern discovery under the authors' own alternative proposal.

More importantly, the authors err when they assert that the standard "will" apply to disclosure in all types of cases. They fail to take into account that the disclosure provision in Rule 26(a)(1) is in effect a default rule. The introductory clause states:

Except to the extent otherwise stipulated or directed by order or local rule, a party shall . . .³

This opt-out provision would give courts broad power to alter the obligations under the rule.⁴ It is expected that courts will, by local rule, exempt certain categories of cases in which disclosure would make no sense, such as social security and government collection cases.⁵ Courts may also establish different tracks for disclosure and discovery in different types of cases, as a number have done in their expense and delay reduction plans under the Civil Justice Reform Act.⁶

It is also expected that courts will enter appropriate discovery and disclosure orders in particular cases, employing the procedure under the rule. It calls for a mandatory pre-disclosure conference of the parties under Rule 26(f) to discuss the claims and defenses and develop a plan for disclosure and discovery, followed by the mandatory Rule 16 scheduling conference at which the judge takes appropriate action for the management of the case, including making orders governing discovery and disclosure. In this way, courts will adapt the disclosure modification to the needs of particular cases, such as complex cases in which the issues may not be clearly defined at the outset of the litigation.

The authors, moreover, ignore the reality that most civil cases litigated in the federal courts are "small" cases in the sense that, as a result of excessive discovery activity, the cost of litigation can become disproportionate to the amount at stake.

¹ Bell, Varner and Gottschalk, *Automatic Disclosure in Discovery—The Rush to Reform*, 27 Ga.L.Rev. 1 (Fall 1992) ("Automatic Disclosure"). The article quotes relevant portions of the proposed amendment.

² *Id.* at 39, 48-9.

³ This is the text of the provision as it appears in the proposed amendments transmitted to the Supreme Court on November 27, 1992. The text of the amendment as it appears in the article (see *id.* at 3) omits the words "or local rule" and thus conceals the fact that courts may override the disclosure provisions by local rule as well as by case-specific order or stipulation.

⁴ The opt-out provision will in effect accomplish what the authors advocate, *id.* 53-57, and what Justice Scalia urged be done (see Supreme Court Order April 22, 1993, re Amendments to the Federal Rules of Civil Procedure, Scalia, J, dissenting, at 5-6), that is, to permit local experimentation.

⁵ Contrary to the authors' suggestion, the opt-out provision is no limited to modification on a "case by case basis." *Id.* at 37, see also note 3.

⁶ The escape clause is sufficiently broad to allow for considerable variation among districts, the result of which will be to make available experience under a range of different approaches, as the authors urge. *Id.* at 57.

The product liability and other complex cases about which they are concerned are only a small percentage of the docket and are not representative of the overall system.⁷ Under the amendment, counsel in those cases will be able to develop procedural orders appropriate for the management of disclosure and discovery.

It is in the universe of the routine cases where disclosure is intended to have its principal effect.⁸ In those cases the issues generally are not particularly arcane or obscure, as they may be in some of the product liability cases that occupy the authors, and the information to be disclosed will generally be obvious. The importance of the amendment is that it offers a device to cut through the tangle of discovery that now ensnares litigants as soon as the action begins. Discovery has become a knee-jerk reflex action that quickly takes on a life of its own, resulting in costs that tend to deny access to justice to both plaintiffs and defendants. The amendment is intended to encourage early definition and narrowing of issues and to get core information on the table quickly, cheaply and without adversariness, in the hope that this will bring about an earlier and less expensive resolution.⁹ In fact, knowing that this is how the rule will operate may deter much litigation because parties will be on notice that they cannot play the discovery game in the hope of exhausting their opponent before he discovers adverse evidence (or the lack of support for their position).¹⁰

II. THE DISCLOSURE PROCESS IS BASED ON THE PUZZLING BELIEF THAT IT WOULD RETURN A LEVEL OF PROFESSIONALISM AND HARMONY TO THE DISCOVERY PROCESS¹¹

Though this is a consummation devoutly to be wished, the goals of the amendment's supporters are more modest. The amendment grows out of a recognition that the unrestrained operation of the adversary process frustrates its larger purpose to promote truth finding. As it functions in the context of discovery, the adversary process tends to have the opposite result.¹² Meaningful discovery requires that lawyers comply with an obligation to disclose and produce material harmful to the client's interest, but that obligation will often seem in conflict with the postulate of the adversary process that a lawyer's first duty is to protect the client's interest. The adversary process is also premised on the presence of a neutral arbiter to oversee and control the litigation; yet discovery by necessity must function largely without oversight and control.

The purpose of the amendment is to moderate the excesses of the adversary process in two ways: 1) to remove any doubt that the lawyer owes a duty to the court to make disclosure of core information (though no more disclosure than good lawyers recognize they must make now when the right discovery demand is made),¹³ and 2) to reduce the amount of controversy over discovery that some lawyers now generate, often in the hope of wearing down their opponent and delaying the evil day when they must produce or disclose that which they would rather withhold. Disclosure will not make litigation all sweetness and light, but by making a lawyer's obligation manifest, it should eliminate much of the game playing common to discovery; consider how often lawyers ask themselves, "how can I interpret this interrogatory, or document request, to avoid giving up what I know my opponent is after?" While there will be follow-up discovery after disclosure (such as depositions), if disclosure works as intended much important information will first have been exchanged.

That is not to say that the amendment would, as the authors contend, "undermine the adversary system and invade the work product of attorneys."¹⁴ Their assertion that it "ignores both the work product doctrine and attorney-client privileges" is

⁷ During the statistical year ended September 30, 1992, product liability cases, for example, accounted for only about 5% of all civil filings. 1992 Annual Report of the Director of the Administrative Office of the U.S. Courts, Table C-2. See also Winter, Foreword: In Defense of Discovery, 58 Brooklyn L. Rev. 263, 275-76 (1992) ("Winter"). Judge Winter was a member of the Advisory Committee on Civil Rules and participated in the deliberations and decisions leading to the adoption of the amendment.

⁸ Winter, note 7 at 275-76.

⁹ Advisory Committee Note, subdivision (a). See Winter, note 6 at 271.

¹⁰ See Automatic Disclosure, note 1 at 12.

¹¹ Id. at 40.

¹² See, generally, Schwarzer, The Federal Rules, The Adversary Process, and Discovery Reform, 50 U. of Pitt. L. Rev. 703 (Spring 1989) ("Federal Rules and the Adversary Process").

¹³ "All attorneys, as 'officers of the court,' owe duties of complete candor and primary loyalty to the court before which they practice. An attorney's duty to a client can never outweigh his or her responsibility to see that our system of justice functions smoothly" *Malautea v. Suzuki Motor Company, Ltd.*, F2d (11th Cir. April 9, 1993).

¹⁴ Automatic Disclosure, note 1 at 46-48.

simply wrong.¹⁵ Rule 26(b)(5) specifically allows parties to assert a work-product or privilege claim before materials subject to such a claim need to be disclosed or before a party may depose a witness.¹⁶ The rule requires nothing to be disclosed (such as privileged or irrelevant matter or work product) that would not now have to be disclosed if requested—it “simply [does] away with the need for a party to make a formal request for discovery and with the opportunity for the adversary to resist.”¹⁷

Nor would the rule require counsel to “use his or her creative and analytical talents to discern the theories of the adversary” to determine what to disclose.¹⁸ The rule requires disclosure only of “discoverable information relevant to disputed facts alleged with particularity in the pleadings.”¹⁹ As the Advisory Committee note points out, the extent of the disclosure obligation is directly proportional to the specificity of the allegation; vague and conclusory allegations do not obligate lawyers to search out witnesses and documents to make the opponent’s case.²⁰ What the rule should accomplish is to reduce the cost and delay of getting at plainly relevant core information would limit the opportunities to obstruct and delay the disclosure of such information when it has potentially adverse consequences. If in the process it also helps raise the level of professionalism and restore a measure of civility, so much the better.²¹

III. THE VAGUENESS OF THE DISCLOSURE RULE WILL INCREASE MOTION PRACTICE²²

In support of their contention, the authors refer to allegations from what they describe as a “typical case filed in federal court”:²³

Defendant . . . placed said automobile into the stream of commerce in a defective condition, unreasonably dangerous for use . . .²⁴

The authors maintain that under the proposed disclosure rule, such a pleading would give the defendant “no basis to determine what or how much information should be disclosed. . . .”²⁵ The short answer is that such an allegation, failing to “allege . . . facts with particularity,” does not trigger an obligation to disclose.²⁶ Moreover, such pleadings in the present discovery regime routinely lead to vague, catch-all discovery requests that do not measure up to the standards the authors hold out in the article: “specific” requests conveying “clear and distinct obligations.”²⁷ All too often, requests do not, as the authors think they should, “identify with some degree of specificity those documents the party needs. . . .”²⁸ The authors will no doubt concede that lawyers are commonly left “wondering whether countless individuals, documents, data collections, and tangible things should be included in the . . . disclosures.”²⁹ There is no reason to suppose that motion prac-

¹⁵ *Id.* at 5.

¹⁶ Winter, note 7 at 270.

¹⁷ *Id.* at 271. The authors’ suggestion that the amended rule would somehow undermine attorneys’ ethical obligations by requiring disclosure of information “harmful to the client’s cause” is baseless. Automatic Disclosure, note 1 at 5. Lawyers are under the same obligation now, but their efforts to evade it cause much of the delay and expense in discovery. Opposition to disclosure as “fundamentally incompatible” with the adversary process has turned a blind eye to a lawyer’s professional obligations. See the ABA’s statement quoted in Automatic Disclosure, note 1 at 46–47.

¹⁸ *Id.* at 5.

¹⁹ Rule 26(a)(1)(A) and (B) (emphasis added).

²⁰ Advisory Committee Note, subdivision (a), paragraph (1) Winter, note 7 at 269.

²¹ Justice Scalia, in his dissent, observes that “the [disclosure] regime does not fit comfortably within the American judicial system, which relies on adversarial litigation to develop the facts before a neutral decisionmaker.” Order note 4, at 5. But the problem (and the circumstance animating this reform effort) is that the safeguards and incentives of the adversary process do not work well in the discovery process which largely occurs out of sight of the “neutral decisionmaker.” See Federal Rules and the Adversary Process, note 12, at 713.

²² Automatic Disclosure, note 1 at 5, 41–42.

²³ While allegations such as those quoted in the text from a product liability case must be dealt with, they are hardly typical of Federal Court pleadings. See note 3.

²⁴ Automatic Disclosure, note 1 at 42.

²⁵ *Id.* at 42.

²⁶ Winter, note 7 at 269.

²⁷ Automatic Disclosure, note 1 at 42, 49.

²⁸ *Id.* at 47.

²⁹ *Id.* at 42. And the present regime regularly “plac[es] upon lawyers the obligation to disclose information damaging to their clients . . . in a context where the lines between what must be disclosed and what need not be disclosed are not clear but require the exercise of considerable judgment.” Scalia, Order note 4, at 5. As discussed in the text, the Mandatory pre-disclosure conference, followed by the Rule 16 conference, will clarify the disclosure obligation more effec-

tice will increase under disclosure over what now occurs to resolve discovery disputes, and the authors' dire prediction is not supported by the early experience of the approximately twenty-four districts³⁰ that have adopted variants of prediscovery disclosure.

To the contrary, there are reasons to expect that motion practice will be reduced. One reason is the pre-disclosure, pre-discovery conference mandated by amended Rule 26(f), followed by the Rule 16 conference with a judge leading to an order that would govern disclosure and future discovery.³¹ This procedure will help identify and clarify issues, thus cutting through the kinds of amorphous and uninformative allegations that concern the authors. The procedure will define the issues, where necessary, and thereby the scope of disclosure and discovery, and will anticipate and avoid disputes. Parties will be required to develop a plan for disclosure and discovery in light of the issues at the outset of the litigation.³² Another reason why motion practice may be reduced is that as disclosure reduces the amount of discovery needed, there will be fewer opportunities for disputes leading to motions. Finally, the disclosure regime should put a damper on the proclivity of some lawyers to use uncertainties that surround many discovery requests as an invitation to obstruct, delay, avoid and harass, spawning disputes and motions to resolve them.³³

The authors' contention that early judicial involvement is essential to a cost-effective discovery process is unassailable, but it is difficult to see why they view the proposed rule as substituting "motion practice" for judicial involvement.³⁴ Judicial involvement is mandated by Rule 16; in the disclosure system, that involvement will be more effective than it is now, or would be under the authors' own proposal, because it will be informed by the parties' early disclosures. The attorneys will become more knowledgeable about their own and the opponent's case earlier than is now the practice, and that in turn will lead to the judge being better informed about the case. As a result, the Rule 16 conference will be more productive, and the orders made will be more on target in guiding future discovery; this too should reduce motion practice.³⁵

IV. THE VAGUENESS OF THE RULE WOULD LEAD TO OVER-PRODUCTION OF marginally RELEVANT DOCUMENTS AND INFORMATION³⁶

The rule requires disclosure, not production. With respect to persons having discoverable information, it requires a brief statement identifying them and the subjects of their information. With respect to relevant documents, it requires a "description by category and location."³⁷ Armed with this information, the opponent should be able to request only what is considered relevant and useful, avoiding over-production. This should lead to more cost-effective discovery. If request nevertheless engenders over-production, the cause does not lie in disclosure but in a possible misuse of the discovery process.

tively than the existing discovery regime and will ameliorate the concern over having to disclose on a lawyer's "own Initiative." *Id.*

³⁰ See *id.* at 20.

³¹ Advisory Committee Note, subdivision (1) The authors' criticism (Automatic Disclosure note 1 at 52) that the Rule 26(f) conference "is almost totally unrelated to the discovery process" is belied by a reading of the rule; among other things, the rule will require the attorneys to "submit[] to the court within 10 days after the meeting a written report outlining the [discovery] plan." The principal difference between the proposed rule and the authors' proposal is that the latter separates the discovery order from the order entered under Rule 16. As discussed here, however, it makes more sense for a judge to enter a combined scheduling/discovery order after the comprehensive consideration of the case envisioned for the Rule 16 conference. In other respects, the authors' "Meet and confer" rule, see *id.* at 50-51, would function just as the process under the amendment.

³² Thus accomplishing exactly what the authors advocate. See *id.* at 49.

³³ See, for example, *Malautea v. Suzuki Motor Company*, F2d (11th Cir. April 9, 1993).

³⁴ The Advisory Committee's purpose of accelerating the exchange of basic information and eliminating paperwork associated in requesting it can hardly be equated, as the authors suggest, with a "desire to reduce judicial involvement." *Id.* at 53 (emphasis in original).

³⁵ As anyone having experience with early Rule 16 conferences knows, their principal shortcoming is that the attorneys often know little about their own case and less about their opponent's and thus are unable—and sometimes also unwilling—to disclose much to the judge. This in turn leaves the judge largely flying blind early in the case.

³⁶ Automatic Disclosure, note 1 at 5, 43-44.

³⁷ The rule provides a procedure for resolving any uncertainties over the scope of the required disclosure. See note 28 and accompanying text.

V. AUTOMATIC DISCLOSURE WILL ALMOST CERTAINLY INCREASE COSTS³⁸

The authors do not defend the existing discovery regime; they acknowledge "unanimity . . . that discovery is now overused and abused . . . and that . . . the process requires lawyers to try their cases twice: once during discovery and . . . once again at trial."³⁹ What evidence is there to suggest that a disclosure regime will increase costs over the existing discovery regime? The authors' speculation that it will is based on propositions this discussion has shown to be unfounded and derived from an erroneous and somewhat myopic view of the meaning and operation of the rule.

There is in fact reason to expect savings both in money and time. Disclosure will obviate wasteful and unnecessary discovery.⁴⁰ Parties will not have to labor to discover the identity of persons (known to the opponent) with relevant information, and they will be saved from talking unnecessary depositions of persons who turn out not to have information. Similarly they will be spared the cost of identifying relevant documents and seeking production of irrelevant matter, and they will be able to obtain documents more quickly, making them more readily available at depositions.

No one can, of course, predict with assurance how practice under the disclosure provisions will turn out. But the case for discovery reform is overwhelming,⁴¹ and disclosure has compelling logic on its side and is surrounded by ample safeguards. It is part of a package which contains other desirable features of which the authors do not complain, such as the early disclosure required of plaintiff's damage computation and the extensive pretrial disclosure of the content and basis of expert testimony. Reform is never a sure thing, nor without some pain—it has been described as taking the bone away from the dog. But the proposed amended rule has received extraordinarily lengthy and thoughtful consideration and deserves support.

Mr. HUGHES. The mandatory disclosure provision of rule 26 allows for a local rules option, as you just indicated, Judge Schwarzer. Aren't you concerned that many courts will opt out of the mandatory disclosure and perhaps balkanize the discovery process in Federal practice?

Judge SCHWARZER. Well, there is now a considerable diversity in discovery practices in local rules and general orders as a result of the process initiated by the Civil Justice Reform Act, which calls on courts to identify their problems and to work out their own solutions. This will legitimate it.

Now, in fact, there are wide disparities in the practice in Federal courts in any event. Individual judges have different ways of going about it. I don't think that this will aggravate the present situation, but it will provide opportunities for improving the process and legitimate those improvements.

So I don't think that is a problem that is attributable to these amendments.

Mr. HUGHES. Judge Keeton, the Advisory Committee on Civil Rules recommended that rule 11 sanctions be mandatory, but the Rules Committee changed that to discretionary. There was, however, no rationale given for the change. I wonder if you can inform the subcommittee of the rationale of the Rules Committee for its particular action.

Judge KEETON. Yes. I think there were two principal reasons that the majority of the standing committee voted to change that "shall" to "may." One is concern that there had been a growing body of discovery disputes, rule 11 disputes that required judicial hearings and action after the 1983 change was made.

³⁸ Automatic Disclosure, note 1 at 5, 44-46.

³⁹ *Id.* at 11.

⁴⁰ The disclosing party's "obligation under subdivision (g)(1) to make a reasonable inquiry into the facts of the case," Advisory Committee Note Paragraph (1)(D), is no more than a lawyer's minimum professional obligation of due care.

⁴¹ The authors agree that reform is needed. See *id.* at 4, 39.

Now, the fact that it occurred, the correlation with the 1983 amendment, doesn't necessarily mean there is a cause-and-effect relation, but it created a concern. And I think that concern is explained a bit when I suggest a second reason; that there is also concern that the mandatory sanction was having an effect, adverse effect, overdeterrent effect against assertions of claims that involved a proposal by an advocate for modification or extension of precedents.

We do not want to have sanctions against legitimate requests for the courts to modify or extend precedents. But if there is a mandate that whenever a violation of rule 11 occurs there must be a sanction, then there may be overdeterrence.

In this connection, I think trial lawyers are especially sensitive today to something I think was not discussed in the 1983 Rules Enabling Act process discussion; that is, it is impossible to limit the effect of a sanction to just what the judge orders, because we have a legal malpractice system in which every sanction has to be reported to the insurers. They quite legitimately have an interest in it.

Sometimes the real impact of a sanction is far beyond what was contemplated by the rulemakers or by the trial judge in imposing it. And I think those two things put together gave us a concern that we were having more litigation over rule 11 violations than was appropriate, and perhaps overdeterrence of some behavior that we do not want to deter—that is, the legitimate urging of amendment, modification, or extension of precedent.

Mr. HUGHES. Rule 11, the proposed change in rule 11, also seems to contradict what the U.S. Supreme Court recently said in *Cooter & Gell v. Hartmarx Corporation* (1990). In that case the Court said, "Baseless filing puts the machinery of justice in motion, burdening courts and individuals alike with needless expense and delay. Even if the careless litigant quickly dismisses the action, the harm triggering rule 11's concerns has already occurred. Therefore, a litigant who violates rule 11 merits sanctions even after a dismissal."

Aren't the amendments that are proposed to rule 11 in effect reversing that rationale?

Judge KEETON. Not truly, for this reason. The Supreme Court in that case was interpreting rule 11 as it existed. And the Supreme Court has been very faithful to the proposition that when they are interpreting rulings, as when they are interpreting statutes, they do not engage in independent policy analysis, but instead an analysis of the underlying policies manifested in the statute or in the rule.

Careful examination of the opinion of the Court in that case discloses that was exactly what they were doing. We more recently, as the committee is aware, I know, have been concerned about another case, the *Lumberman's* case, in which the Chief Justice's opinion, again, interprets a rule with respect to particularity of pleadings exactly the way they read it, but then suggests perhaps the Rules Committees should reexamine it. That is what we are doing.

So we have reexamined rule 11 in this circumstance and have made a recommendation, which of course goes through the Su-

preme Court as well as here, for a reconsideration of the underlying policy of the rule as it existed with the 1983 amendment.

Mr. HUGHES. Judge Pointer, the criticism leveled at rule 30(b) concerns the reliability of audio and videotape. How do you respond to concerns that crucial evidence may be lost or distorted through that process?

Judge POINTER. I would, number one, say that while I have had videotaped depositions used in cases before me, it is not that frequent, so perhaps if I had had it occur more frequently I would know more of that problem. I have not seen any indication that when videotaped depositions were used at trial there was any problem with accuracy, faithfulness, fairness, or indeed up to this point, with the durability of the record.

I have seen and heard those comments. I simply have no experience that would substantiate them.

Mr. HUGHES. There seems to be some agreement, Judge Keeton, that the cost of discovery must be reduced. Shouldn't we look to the results of the pilot programs that were introduced in the Civil Justice Reform Act of 1990 first?

Judge KEETON. Certainly it is important for us to use those experiments that the Civil Justice Reform Act—

Mr. HUGHES. Why do we engage in such demonstration projects and experiments if we don't await the results before we make permanent changes?

Judge KEETON. Well, actually that point introduces another reason that the amendment that is now before you should be adopted—for the reason that there exists a problem, which some of us may have to decide judicially in an individual case, about whether there is some conflict between the Rules Enabling Act and the Civil Justice Reform Act.

Mr. HUGHES. Have there been any challenges to the experimental rules?

Judge KEETON. I am not aware of one that has come up yet. It is an issue that has been discussed in some circles in the bar, and bench/bar discussion. I am hoping we don't have to face it, because it would be a difficult problem. And if these amendments go through, I hope that they would be effective then by December 1 at a time before we are likely to have those challenges presented.

Judge POINTER. Mr. Chairman, may I intervene?

Particularly if Congress were to pass legislation that at this point suspends the effective date or renounces the changes as they relate to rule 26(a)(1), it seems to me it is going to aggravate the problems of whether disclosure plans are permissible under CJRA when Congress has taken action in effect saying "no" to some kind of authorization.

Judge SCHWARZER. Mr. Chairman, may I add something about the studies under the Civil Justice Reform Act?

There are two sets of districts. You referred to both. There are so-called demonstration districts, which are conducting various kinds of alternate dispute resolution methods and procedures, and they are being evaluated. They have nothing to do with—

Mr. HUGHES. Have they all been implemented, all 20?

Judge SCHWARZER. Well, there are five demonstration districts, and they are in operation, and they are currently being evaluated.

In addition to that, there are 10 districts, 10 pilot districts and 10 comparison districts. They will be evaluated at the end of the 7-year period by the Rand Corp. that is now launching a study. But they would be evaluated with respect to the overall impact of the measures that have been adopted as part of the civil justice expense and delay reduction plans, of which discovery may or may not be a feature, but in which many other procedures like tracking and differentiated case management and other aspects are involved.

So you will not under those evaluations get a discernable, specific study that will determine the impact of the use of disclosure. It will be an overall study of the impact of the civil justice expense and delay reduction plans, measures that have been adopted compared to other districts that have not adopted similar plans.

So you are not going to know a lot more about discovery or disclosure at the end of the 7-year period.

Mr. HUGHES. I have some other questions, but I will recognize the distinguished gentleman from California.

Mr. MOORHEAD. Thank you, Mr. Chairman.

I guess there is a very fine line for lawyers, whether they aggressively take care of the needs of their clients and perhaps stretch the rules in order to do that sometimes, or whether they lay back and are very docile and follow the rules that have been set before them without testing them. They get into trouble either way.

I guess that is the reason this rule 11 is somewhat controversial, because it is important that the court be able to control the administration of justice that is before it, and at the same time it is also important that lawyers be able to take care of the needs of their clients as the law provides the ability to do so. I suppose what you are trying to reach here is an area that can bring those two things together.

Insofar as the safe harbor provision, does that encourage people to really stretch the rules, the lawyers to really stretch the rules, knowing that if they get caught at it they can pull back? Or is it a justifiable change?

Judge POINTER. If I may, Mr. Chairman and members of the committee, the 21-day safe harbor provisions will not encourage the filing of frivolous claims or defenses, because it does not provide a safe harbor for judicially initiated sanctions. It solely relates to sanctions initiated upon motion of a party. The courts still can say, "You should have an imposed sanction."

It does not in any way prevent, for example, the filing of independent lawsuits for malicious prosecution. What it does is say as to this particular rule in the process, we are going to pull back somewhat in order to give people a better chance when being notified, Hey, your pleading is off the wall, to say on review, "Yes, and to withdraw it."

At the present time when that concern is raised, the attorney confronted with that motion has a very difficult choice to make. Not only is there the problem of potential conflicts of interest between the attorney and the client, which sometimes even result in having to get separate counsel because of the rule 11 motion separating the attorney from the client, but it also makes it more difficult for a lawyer to withdraw that potentially offensive conten-

tion, because you are then virtually acknowledging that there was something wrong with your pleading.

And so it was in that light as well as to get the court out of this process to the extent we could, that we thought the 21-day safe harbor on motions by the attorney was desirable.

Mr. MOORHEAD. Along that same line is the discouragement of the payment of litigation expenses. Are you recommending that so that there wouldn't be encouragement for counsel on the other side to bring these motions?

Judge POINTER. I would say that is a part out of it. We do not believe that through the vehicle of obtaining some private gain, that is, attorneys' fees for matters not connected with the filing of the motion itself but for other things that arose out of the pleading to which the rule 11 motion was addressed, we don't believe there should be that kind of encouragement to file those, and it should be viewed, rule 11, as one that really is addressed, as rule 11 right now states, to representations, or, in this instance, misrepresentations to the court. That is really what rule 11 is designed to do.

We think that by shifting over to a deterrent mode as opposed to a compensatory mode, and both would be perhaps legitimate objectives, both were there when the 1983 version was adopted, and over time the court said, "We want to move and call this deterrence."

And that is what we have attempted to do, is to follow that model, that the sanctions themselves should be viewed from the standpoint of deterrence, not as compensation, and except in very unusual situations, monetary awards would not go to the other side.

Mr. MOORHEAD. How do these mandatory sanctions work in the courtroom? What is your reason for going to the discretionary sanctions?

Judge POINTER. Back to what Judge Keeton had to say on this, the issue of mandatory sanctions is to some degree illusory because although the rule has stated "shall impose," in fact and in practice many, many judges have used the word "may" in that process, either in deciding when there has been a violation, and there is some discretion in that, if you look at the standards for review, you see that it is on review treated as discretionary; but also and more particularly in the type of sanction that is imposed. The judges under the 1983 version were given discretion as to the type of sanctions.

Therefore, the judge could say, "Well, there has been a sanction, there has been a violation, but here is going to be the sanction." And in effect it is a mere pat on the back of the wrist, and in effect you have had an actual practice in many courts of treating the rule as discretionary even though the wording of it was mandatory.

Mr. MOORHEAD. Maricopa County, AZ, has been experimenting for over a year with a disclosure requirement similar to rule 26(a)(1). These attorneys reported overwhelmingly that disclosure has increased the cost of litigation, chilled the willingness of clients to disclose information to their own counsel, and has not led to earlier disposition of cases nor reduced unnecessary adversarial conduct.

Is this the only survey that you know of that has been conducted on this?

Judge POINTER. I am not even aware of that as a formal survey, and on inquiry about it earlier with attorneys from Arizona, attorneys were unaware of any formal survey having been conducted. That is not to say there have not been some informal surveys taken.

It should be noted, however, that the Arizona disclosure requirements are far more expansive than the relatively modest default provisions contained in 26(a)(1).

Answering your question, I know of no formal study anywhere, Arizona or elsewhere.

Mr. MOORHEAD. Do you have a comment, Mr. Schwarzer?

Judge SCHWARZER. No. I have been following what is going on in Arizona because I have a personal interest in it. I have never heard of such a survey.

Mr. MOORHEAD. I have no further questions, Mr. Chairman.

Mr. HUGHES. The gentleman from Wisconsin.

Mr. SENSENBRENNER. Thank you very much, Mr. Chairman.

I am concerned about both of the major proposed rule changes, and I think perhaps I will start out with the proposed change in rule 11, and direct my comments toward Judge Keeton.

I think we all know we have a litigation explosion in this country. The cost of this litigation is lowering American productivity, which costs us jobs and also costs us both domestic and international markets. And somehow we have got to get a handle on our suit-happy society without trampling on the rights of those who have been legitimately injured as a result of either negligence or a violation of the law applicable standard by someone else.

Rule 11, as it was originally promulgated, I believe was designed to prevent the filing of frivolous lawsuits that were more designed to force a settlement because it would be cheaper to settle the case than to expend the money to defend the case and have the jury determine that the defendant was, quote, "not guilty," unquote, of whatever is being alleged.

My feeling of the proposed change in rule 11 is that by taking away the mandatory sanctions, you are going to have more frivolous lawsuits filed simply because the attorney that files the frivolous lawsuit knows that he can escape the sanction if he gets caught and can withdraw that frivolous pleading or frivolous motion within 21 days if someone objects.

Now, the benefit, therefore, I think flows to those who are filing these types of pleadings and perhaps who are Federal district judges who don't have to spend as much time on the bench listening to rule 11 motions, and the victim is really the person who has been on the receiving end of this.

Now, how does your proposed change to rule 11 encourage justice by letting those who are responsible for filing frivolous pleadings off the hook with no monetary damages, and make a victim who has received a frivolous pleading have to expend the money in an uncompensated way to bring a motion before the court to pressure the withdrawal under the safe harbor provisions?

Judge KEETON. Well, let me say first, I fully agree with your statement of the conflicting interests that we have to accommodate here.

Second, I do not think that the proposed amendments that are now before you give a free pass for frivolous lawsuits. Number one, the judge still may sanction sua sponte. The rule only requires that a party's motion go through the process of giving notice and an opportunity to withdraw first.

Third, the party who thinks the lawsuit is frivolous may give that notice immediately, the 21 days starts running; it doesn't even come to the attention of the court until the opportunity to withdraw has occurred. And if that opportunity is taken, there is minimal cost involved, both to the opposing party and to the system. If that opportunity is not taken, then the rule 11 motion comes to the court, and it is ruled on.

So our objective here is exactly the objective of accommodating the conflicting interests you have suggested, and we think we have accomplished it in a way that will involve less cost to the system, both to the opposing parties who suffer some cost as a result of the frivolous claims against them, and to the court system.

Mr. SENSENBRENNER. Isn't it a tremendous burden for someone who is claiming that a frivolous lawsuit has been filed against them to prove that the lawsuit is frivolous?

Judge KEETON. Well, we have that burden under either form of the rule. Yes, it is, and that is what makes it necessary to have substantial hearings.

What this does is to give the opposing party an opportunity to give the notice without going through that cost. And if that notice does not have the effect of having the withdrawal of it, then the burden that remains is exactly the same burden that exists under the present rule.

Mr. SENSENBRENNER. But proving the case would require an awful lot of time on the part of the counsel for the victims. And if there are not mandatory sanctions, and the counsel for the victim and the victim prevails and the court makes a determination that the lawsuit is frivolous, then how does that party get made whole? What deterrent effect is there?

Judge KEETON. Well, there is still, even though the sanction is not mandatory, there is still the discretion in the court to make it that severe. What the discretion gives is a chance for the court to think about whether this truly is that kind of frivolous lawsuit that deserves the mandatory full sanction.

Mr. SENSENBRENNER. Your Honor, I didn't practice very much law before I got elected to this body, but rare is the case that I can remember a judge really throwing the book at an attorney who filed frivolous cases, particularly since there is more of a sanction than just the monetary award that may be ordered by the court. The report of the malpractice insurance carrier is going to create an economic sanction for that counsel that will last far beyond the disposition of the case.

Judge KEETON. I agree with that, and I agree also that judges do not like to be imposing sanctions on lawyers. It is a part of my assignment as a judge that I like almost as little as criminal sentencing decisions.

Mr. SENSENBRENNER. We will talk about that one later.

Thank you very much, Mr. Chairman.

Mr. HUGHES. The gentleman from California.

Mr. EDWARDS. No questions, Mr. Chairman.

Mr. HUGHES. The gentleman from New Mexico.

Mr. SCHIFF. I would like to go back and talk about rule 26 for a moment.

Judge Pointer, I think, if I understood you correctly, you are referring to the proposed changes in rule 26. When you presuppose the idea of assuming that a motion for discovery has been filed, assuming an objection has been interposed and assuming the objection has been denied, you start from there. What is the purpose eliminating that as an actual procedure? What is the purpose of starting three steps ahead and thereby essentially deny a party the right to object and to have a real sitting judge make a determination?

Judge POINTER. As to the items in 26(a)(1)(A) and (B), that is identification of witnesses and description of documents, the rules currently provide that those items are discoverable. There is no reason to have to go through the process of having the interrogatory asked, the objection filed, and then the order by the court, because the order is preordained, and what you are really talking about is simply a waste of three separate pieces of paper being filed, both in terms of time and expense, one of which involves the court's time in addition that of the lawyers.

If you talk about other items that might be required to be disclosed beyond that core information, then we have the process that remains for formal discovery request and opportunity to object and to get rulings. But as to those, the identification of witnesses and the documents, they are presently discoverable.

There is even an obligation under the present rules to supplement the identification of witnesses that is even more stringent than what some of the opponents attack under this rule.

Mr. SCHIFF. Particularly with respect to documents, there can be an issue of breadth of documents that have to be produced. And how is that going to be resolved? We are already into production.

Judge POINTER. This does not get rid of document requests. This anticipates those requests by getting simply a description of the types of documents and where they are located so as to enable counsel to draft better and produce fewer controversies, those requests under rule 34 for production. They come later, and you can object. You can say it is burdensome or whatever it may be.

Mr. SCHIFF. Under rule 26, what is the time frame? In other words, from the day the plaintiff files the lawsuit, how fast can production be required under this proposed change?

Judge POINTER. There is to be no disclosure until the time frame set, unless the court locally makes a change or counsel agreed to a different setup, until essentially a time that is measured from the date of a scheduling order. You have to look really at rule 16 from rule 26 to do it.

But in practical terms it means that typically a defendant would have 75 days after being served with a complaint in which to produce the information of core information that the rule contemplates.

Currently interrogatories are served frequently with complaints and a defendant has 45 days to respond and provide answers to the interrogatories that come with the complaint. So effectively there

is additional time being given, and even more important, a restriction on the quantity, because your typical interrogatories that come with a complaint are going to ask for far more than what 26(a)(1) calls for.

Mr. SCHIFF. If I may pursue this just one more step, is there anything in the proposed change—I am looking in conjunction with the fact that there is now a 21-day grace period, if you will, a safe harbor period, to withdraw a frivolous suit. Is there anything in this proposed change in rule 26 that would allow for the production of documents within the 21-day period for the safe harbor provision essentially to allow a plaintiff's attorney to go fishing, and then if they don't find what they are looking for, dismiss what was previously a frivolous lawsuit and just walk away from it?

Judge POINTER. If I understand your time sequence, this is a frivolous complaint, the defense says, the defendant serves a rule 11 motion, and now the plaintiff is seeking discovery during that period of time, if I understand it.

Mr. SCHIFF. Exactly.

Judge POINTER. These rules would not permit that without permission of the court, unless there is agreement of the parties or the court has adopted some local rule that changes it, because there is to be no formal discovery until that first meeting of counsel; that is, the meet and confer.

And that is set by reference, again, to the date of the scheduling order, and again, typically that is going to be 75 to 90 days after the filing. So there is not going to be any of that discovery unless in your situation the plaintiff gets permission from the court for early discovery in order to see if there is evidence that supports, quote, this labeled "frivolous complaint," if I understand your question.

Mr. SCHIFF. I believe you did, and I thank you for the response. Thank you, Mr. Chairman.

Mr. HUGHES. The gentleman from North Carolina.

Mr. COBLE. Thank you, Mr. Chairman.

Gentlemen, thank you all for being with us.

Let me take them in order of precedents. Rule 11, as has been indicated here today, convincing arguments can be put forward on each side of this issue, but on balance, I have no problem with the three proposed changes.

I will admit, gentlemen, there are some bold, reckless lawyers out there who come before you all who are capable of creating havoc, but I think there are more conscientious, discreet lawyers who are not concerned about creating havoc. I think probably a good argument can be made that these changes may well promote fairness and equity. So I have no problem as to rule 11.

Let me shift to rule 26.

Judge Pointer, either you or Judge Schwarzer in your statement made these words as to disclosure requirements. I think it was Judge Pointer, and I can't find it in your statement. You indicated the importance of being more selective, more restrained, and what was your third—

Judge POINTER. More efficient.

Mr. COBLE. More efficient. I missed that and I can't argue with either of those proposals. I am concerned, however, and I will be

glad to hear from you all in response as to whether or not trial strategy is going to be compromised here.

I mean, as you gentlemen know, trial strategy is a very significant part of litigation, and as the gentleman from Wisconsin said, I will admit, we have become a litigation-conscious, litigation-happy, you know, file a suit, haul them into court, and that may well have been abused.

But I don't want the strategy of trial to be compromised, I don't want a client to say, "Well, my gosh, if we are going to have to fully and automatically disclose everything but the kitchen sink, I just won't fully disclose to my lawyer everything I know now."

Now, am I overreacting, gentlemen, to this? I would be glad to hear from you.

Judge POINTER. I believe the concerns are legitimate. I don't believe the answer, however, is one that would cause in any way these rules to be put aside. There is the potential as to strategy, that at the present time some lawyers believe they can win cases by deluging their opponents with discovery demands, with briefs, with the requests, to the point of killing their opposition.

Unfortunately, these rules will not totally, and I am talking about the entirety of rules 26 through 37, do away with that possibility. They will make it a little bit more difficult by imposing some limitations on number of depositions, number of interrogatories and the like.

But still, the attempts could be made for that, and to the extent you can call that strategy, I would say, yes, we are trying to keep down that strategy, but I would not be apologetic for it. We believe that is proper, that is, to stop that kind of strategy of winning a lawsuit by simply killing your opponent with papers.

As to the approach toward the litigation, I don't believe these—particularly the disclosure is what you are really referring to—will affect that because, again, if you look back at what the disclosure obligation is, 26(a)(1)(A) and (B) in particular, it does no more than what attorneys are already being required to do in virtually all cases that are going to need discovery and have potential evidentiary hearings.

It simply says that, as to the core information, provide that subset of information without the need for a request. If you want more, then you have to do it through the formal discovery.

Judge KEETON. Let me just add one brief point to that. There is one strategy that the rules have long been discouraging and these rules are focused on making more clear we need to preclude; that is the strategy of using procedure to try to win the lawsuit apart from the merits.

These rules, these proposed changes, I think, are well designed to serve the interests that I spoke of in my opening remarks, that we want to make the rules substantively neutral.

So to the extent that the strategy we are talking about has something to do with the arguments on the merits of the case, this is neutral. Both sides have these disclosure responsibilities, and the immediate disclosure responsibility is not even as sweeping as can be required by an appropriate discovery demand under the present rules.

So I think we reserve the substantive neutrality as to any strategy on the merits.

Mr. COBLE. Thank you, Judge.

Judge Schwarzer, do you want to be heard?

Judge SCHWARZER. I would only say this. To the extent there is a problem about clients withholding information from their lawyers so it does not have to be disclosed to the other side, that problem exists to exactly the same degree under the existing discovery system as it would under the disclosure system. There is no difference.

Mr. COBLE. Thank you, gentlemen.

Mr. Chairman, if I may, let me visit rule 30 very briefly. Old habits die hard, gentlemen. And I don't mean this in any way disparaging to you all, but the court stenographer or the court reporter, gentlemen, is just as indispensable as the judge, Your Honors, and I don't mean that in any way to belittle what you all do.

That habit is going to die hard for me, gentlemen, and the burden is going to be on you all to convince me that we ought to just leave this—you have all heard the adage, "If it ain't broke, don't fix it." It is my belief that in this situation, it is not broke. Let me put this question to the three of you.

Are court reporters the source of substantial litigation cost or source of delay for litigation, one; and did your committee receive a substantial number of complaints about the way depositions are presently recorded?

I don't mean that to sound like a rhetorical question, because the answer I am wanting is, no, court reporters are no problem. And I don't think they are. But I guess I am a 19th century man, fellow, and I am just uneasy about this audio and videotaping business. So let me hear from you.

Judge POINTER. Court reporters are not a problem, and this is not designed to remedy some problem with court reporters. We received no complaints about court reporters. There is no desire, no intent, and nothing here that would affect court reporters in the courtroom. It only deals with depositions.

It is not even necessarily designed to facilitate some cost savings. There are substantial arguments that say it is more expensive to videotape than to use a court reporter.

Mr. COBLE. That would be my gut feeling.

Judge POINTER. If lawyers want to make that selection, we assume they will make a decision if they have the option to do so that takes into account cost, accuracy, as well as utility at trial. We are all in favor of that.

Mr. COBLE. Mr. Chairman, I think he has exhausted my time, and I appreciate your generosity.

Gentlemen, thank you all for your responses.

Mr. HUGHES. Does the gentleman from New Mexico have a followup question?

Mr. SCHIFF. I do, and I thank the Chair for recognizing me.

I want to go back to the proposed rule 11 change. This 21 days of what we have called safe harbor where a case can be withdrawn by the plaintiff without sanctions. What triggers that 21 days? Is that 21 days from the filing of the lawsuit or is that 21 days from some type of formal accusation?

Judge POINTER. Twenty-one-some days from the service of a motion seeking sanctions under rule 11. What happens is that a party who believes that the other side has violated rule 11, serves that motion for rule 11, but does not file it unless 21 days then go by and there has been no corrective action taken.

We actually had hoped, and this occurs right now, that prior to preparing and serving the motion, many counsel will call the opponents, say, "You are off the wall on this particular matter, even before I prepare a rule 11 motion, how about looking at this." And sometimes that in fact occurs and attorneys will withdraw it. That is how it works in terms of the timing.

Mr. SCHIFF. But I would then follow up and go back to my earlier question, that it just seems to me that this proposed rule 21 change to rule 11 combined with the earlier discovery, but still the earlier discovery under rule 26 allows for fishing expeditions, allows for lawsuits to be filed, for discovery to take place earlier than is presently the case, and then to essentially dismiss the lawsuit, but to have in one's possession various documents that were the proprietary interests of the defendant.

Judge SCHWARZER. Could I say something about that is? There is a notion that somehow there is a lot of frivolous litigation out there. It is a very rare lawsuit that violates—is found to violate rule 11.

Mr. SCHIFF. Maybe that is because you have present rule 11 without this change.

Judge SCHWARZER. The present rule is quite severe.

Mr. SCHIFF. That is right. That is the point.

Judge SCHWARZER. You are saying it deters, but what I am saying is if a lawsuit is so patently frivolous, the first thing that would happen is there would be a motion to dismiss or for summary judgment, and in all probability disclosure provisions may never become operative, because if it is that plain that the case should be thrown out, that would bring on an immediate motion.

Mr. SCHIFF. Except that most of my practice was in State court, but Federal proceedings don't require too specific pleading, and therefore it is hard to identify frivolous lawsuits right off the bat.

Mr. Chairman, I think the—

Judge KEETON. May I just give an illustration? I find it helpful when I am thinking about a rule change like this to think about cases. I will give you an illustration. A young lawyer filed a lawsuit in my court. The opposing counsel, under the existing rule, couldn't give this notice provision and bypass the process. Instead he filed a rule 11 motion calling attention to a case, which was right squarely in point and meant the case couldn't survive. The plaintiff's attorney recognized it, was ready to withdraw the matter. Now they have a rule 11 motion before me and imperative sanction. What should do I with that case? This is not a case to give that young lawyer a malpractice problem for the future.

So the appropriate sanction was, don't do it again, informally, in the courtroom. The defendant was satisfied with that. They didn't press the motion any farther.

I think this would formalize a process that can be handled now in that way for the frivolous lawsuit that is inadvertently filed. Now, of course, if it is willfully filed for the purpose of harassing,

then the 21-day notice doesn't serve any purpose. I have the rule 11 matter before me and I must deal with it. I think that is appropriate.

It is an illustration of the kind of thing that will be taken out of the system without the friction that the present mandatory sanction makes it necessary for us to have.

Mr. SCHIFF. Thank you, Mr. Chairman, for the additional time.

Mr. HUGHES. Judge Pointer, you have mentioned a number of times the fact that what you are trying to do with mandatory disclosure is to get at the core information. What is core information? What is core information to you may not be core information to me.

One of the complaints I hear most frequently about the proposed change in rule 26 is, what guidelines are attorneys going to have in determining what is pleaded with particularity? Isn't that a legitimate criticism?

Judge POINTER. There may be problems that arise over the interpretation and application of the standard relevant to disputed facts alleged with particularity. There were other options, as you know. We looked at other words. Those generated their own controversy, because they were unfamiliar words. So that is the evolving process.

We do include at two separate points in the advisory committee notes both an explanation of rule 26(a)(1) and under rule 26(f), which is the meet and confer obligation on counsel, on explanation and some clarification and guidance about the application of that standard, and indeed do look for counsel at that mandatory conference to discuss the issues in the case, and perhaps put some meat on the bones that are in the pleadings.

Will that resolve all controversies? No. We think the controversies that remain will be actually offset in terms of number by the ones we don't have, don't get, that we presently are getting in connection with original interrogatories and objections. And we get those virtually in all cases. I am talking about myself, now. Virtually all cases, there will be objections to the original interrogatories that are propounded, and the court has to get involved in it.

Mr. HUGHES. Do you really think you are going to get at those situations which occur frequently. When I was practicing law, if you didn't ask the right question, you didn't get the right answer. You might get around to it with a second round of interrogatories or at the time of deposition. Do you really think the proposed change is going to address that problem?

Judge POINTER. I think it addresses it in terms of the two minor items of information that 26(a)(1) deals with. One is the identification of potential witnesses. And the other is a general description of documents and where they are located.

Now, there is still going to be discovery in cases where this is complied with. There are going to be depositions. But the people will have hopefully a better feel and understanding about who to select for those depositions if they have a list of their own and the other side; a better way of drafting requests for production; or deciding which documents to try to get, and indeed, to avoid some of the controversy, but there is still going to be controversy.

This core information is a small subset of information that litigants are likely to want and need and be getting in the course of discovery. It doesn't address that. It is the limits on numbers that address those problems, not rule 26.

Mr. HUGHES. The provision in proposed rule 26(b)(5) for protection of material that is privileged requires that the party claiming the privilege make that claim expressly and "shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection."

Isn't that going to be difficult to accomplish, in addition to encouraging a rather large motion practice?

Judge POINTER. Well, I would call your attention that this really does deal with discovery requests and has little application—although you can think of a situation that would involve disclosure—but it is really dealing with discovery requests. This is the same kind of thing that goes on in case after case that I bet any of the three of us would recite, and that is using the so-called Vaughan Index in which if a party is going to resist having to produce documents, they are then called upon to give some basic information to say, yes, I am holding back, and a category of documents from client to attorney or back and forth, so the other side then knows whether there is any reason to bring on a motion to test that.

Luckily, I don't get that many motions that contest claims of privilege, but I do get some. You should be aware that rule 45 as it became effective December 1, 1991, a year and a half ago, has the same obligation in it when you are talking about production requests directed to third parties, that if they are going to resist production on the basis of privilege, they have got to make a listing like this.

So there is nothing that we are imposing on parties that we don't already impose on our—

Mr. HUGHES. The point is, you don't think that would encourage any more motions than you presently have?

Judge POINTER. No, I do not.

Mr. HUGHES. Justice Scalia's dissent characterized the new discovery requirements as another layer on the discovery process. Judge Pointer, in your statement you concede that is a legitimate objection.

Judge POINTER. Sure.

Mr. HUGHES. And you say, "We cannot say with certainty that those fears are unfounded."

In light of this, what would be the problem with deferring the amendment for a year to study the impact of disclosure in the pilot programs?

Judge POINTER. Let me see if I can separate two parts to that question. One deals with the criticism about another layer, and the other deals with the suggestion of suspending the effective date.

As to the criticism, I would say that there is no way that you can discount as without merit a criticism that this does provide an opportunity for lawyers to make objections because they now have something called disclosure, which they didn't have before. And there will be some, though we think it is going to be more than off-

set by the reduction in disputes in the formal discovery. And if so, we are prepared and believe that this is a good balance struck there.

There are other reasons for believing this will save time and expense as well. But there are going to be some disputes, particularly during the learning period, when people are having to learn these new requirements.

The other question is, what about suspending the rules or at least 26(a)(1) for a year? Let me suggest that a suspension of 1 year is probably the worst decision that could be made.

Mr. HUGHES. How about if we just reject it?

Judge POINTER. It would be better to reject than to suspend for 1 year, because if you reject, assuming you nevertheless incorporate something that makes it clear to the 21 districts already and to the many others that are planning to have disclosure requirements in their plans, that it is all right, as long as you put that provision in to do it, then it is better to reject the change altogether of 26(a)(1) than to suspend—

Mr. HUGHES. Let me alleviate your concern. That would not be my approach. I mean, there may be a consensus to reject because we don't have enough information. We probably would just reject. We wouldn't suspend. I don't think that would be our process. We would just not accept the recommendation, and then we would have to revisit it.

Judge POINTER. Then I may have misunderstood your question. I thought you were talking about suspending the effective date for 1 year.

Mr. HUGHES. I said defer. I don't think I said suspend. I said defer. We would not accept the recommendations, but with the understanding that we may come back and revisit that.

Judge POINTER. One problem is that if you really expect to get back into the arena from, let's say, this calendar year to next calendar year or the one afterwards, I would be very fearful of further changes in the process until it is time, as the CJRA contemplates, for us to review the experience of 94 courts as well as the 20 that the CJRA calls for, and as CJRA calls for, we are supposed to then reevaluate the national rules based upon that experience.

That process is really talking about something that could only be completed with rules back like they are now. After evaluating that experience, you are in 1998. If you are thinking about doing something that would put off or perhaps revisit in another year or 2 years, those additional changes I think would be very difficult for courts to manage with, and to know what they are guided by.

Mr. HUGHES. I must tell you, just speaking for myself, I am concerned about setting up pilot demonstration programs and then moving ahead making changes before we get the results. I must admit, however, I have seen situations where we have set up demonstration programs, gotten the results, and didn't like the results.

Judge KEETON. Mr. Chairman, may I make two brief points in response to that concern? Number one, in the district of Massachusetts, we have been operating with this system under our local plan since last fall. I haven't yet had my first controversy over the discovery rules. I am waiting for it. In my rule 16(b) conferences, the parties have come, having consulted. The system seems to be work-

ing well. I know I won't be lucky enough to have it keep going that way down the line a long time. That is the first point, though. I think one can be worried about something that may not happen at all.

The second point I want to make is that we won't really know the effect of the experiments for 7 to 10 years. Now, some of the plans for evaluation that Judge Schwarzer has already spoken about are talking about an evaluation 7 years down the line. We won't have anything within a year that is more than an opinion poll without any basis for us to evaluate it other than the credit we give to the opinions of the lawyers and judges who are operating under the system.

Mr. HUGHES. Judge Keeton surely we will have more information a year from now, more empirical data.

Judge SCHWARZER. Not on this subject. There is no empirical data working its way through the system on the subject of mandatory disclosure. And I want to add that the 10 pilot districts in the Civil Justice Reform Act are not required to have mandatory disclosure. Those pilot programs deal with other issues, but not mandatory disclosure, and to my knowledge, offhand I don't know of any of the pilot districts that actually do have a mandatory disclosure system that is at all comparable to what this rule will provide.

So in 7 years or 10 years, you will not have empirical data on how mandatory disclosure worked in the pilot districts or the demonstration districts.

Mr. HUGHES. We do have districts that have some form of mandatory disclosure.

Judge SCHWARZER. You do, but those are early implementation districts. But they are not being studied and there is no effort to maintain empirical data. They have no resources, no people collecting empirical data on the specific aspect of disclosure. So all you will know is what Judge Keeton has just told you. He has got one motion or no motions or what have you.

Mr. HUGHES. My recollection is in your own statement, Judge Schwarzer, you indicate that the results thus far are promising.

Judge SCHWARZER. They are, on the basis of statements such as Judge Keeton's that they have had no complaints and no increase in motion practice in those districts that have it.

Now, it is only fair to say that most of those districts have programs, mandatory disclosure programs different from what that rule provides. There may be some that happen to follow the rule closely, but there is a great variety.

But what we can say is that I know that in the district of Texas, there have been no complaints. I know the Western District of Kentucky is working, and there are no complaints. They are not identical programs, but that is what we know.

Mr. HUGHES. Surely we will have more information, although it may be anecdotal, district by district, a year from now than we do today. I mean, we have been experimenting since 1990.

Judge POINTER. We will, but that will not enable us to do anything with rules changes based upon that some type of experience. Assuming we give full credit to the anecdotal kind of response, still the whole rules process is such that presumably we would be back

in the situation of putting out rules for comment, and we are talking about then a 2½-year period of time——

Mr. HUGHES. Because the process takes so long?

Judge POINTER. Yes.

Mr. HUGHES. Let me ask you, one of the questions that my colleague from New Mexico raised concerning Justice White's comments, should we reexamine the Rules Enabling Act to leave out the role of the Supreme Court?

Judge KEETON. May I respond to that? Number one, of course, none of us can speak even for the Judicial Conference, because it hasn't taken a position on this, much less for the Supreme Court. Only the Supreme Court can speak for itself on this. But I will express a personal opinion on it.

Mr. HUGHES. I understand.

Judge KEETON. I think the Rules Enabling Act process is well designed. The Supreme Court needs to be in the process, not to do the detailed, meticulous kind of drafting and hearings that have been delegated to the Judicial Conference and its rules committees, but they need to be there as a kind of governing board and as the place that has an institutional competence that is special because the place where the whole process might go wrong and not be strictly neutral will be demonstrated by the most dramatically significant cases. That is the small selection of cases that come to the Supreme Court.

So they are in a position to make a judgment that I think needs to be in the system. And I think it is appropriate for them to intrude as much or as little as they think appropriate on the more meticulous process that is going on before it gets to them and then is passed on to Congress.

Mr. HUGHES. Any disagreement?

Judge POINTER.

Judge POINTER. No, the dissents to these recent changes indicate certainly the Justices were reading and considering the changes. They are not simply letting them go through summarily.

The Supreme Court has on occasions, for example in 1991, rejected some rules, sent them back, although they had gotten to that point. And you can go back to several different times where some action has been taken by that. So notwithstanding any discomfort they may feel or some of them may feel in connection with their role, obviously they are playing a significant role, although not in the technical drafting.

Mr. HUGHES. The gentleman from New Mexico.

Mr. SCHIFF. Thank you, Mr. Chairman.

But the transmittal letter we have with these rules, again, we may have had it before and it was not brought to my attention, the Chief Justice says, "We are referring these rules to the Speaker of the House, the Congress, but we are not necessarily saying they are in the form we would prescribe."

So I am asking the panel, as you see it now, do you believe that the Supreme Court has an appropriate role if they choose to exercise it, to veto proposed rules and to say, We don't agree with these, we are sending them back? Because I am not sure the majority sees it that way based upon the letter of transmittal.

Judge POINTER. I certainly agree that that is a legitimate role, one that has been and should be from time to time exercised. The transmittal letter does contain that caveat, that to my knowledge there was never any previous transmittal letter. However, it is a caveat that is expressed in all of the transmissions, not just the civil rules. The civil rules are the ones that provoked the dissent. But that same caveat is in all of the other rules being sent forward.

The actual language is one of adoption. If you look at what actually occurs in the back of the transmittal letter, there is no question about the Supreme Court having adopted these rules. They did adopt them. It is the transmittal letter that contains the caveat.

Mr. SCHIFF. Would either of the other panelists care to respond?

Judge KEETON. Let me add one thing. There is a distinction in the transmittal letter this time from before. I think that is a recognition of the reality that with our more complex litigation today and with the greater complexities of the process of thinking about how we fashion rules that will be procedurally neutral and effective in this context of more complex litigation, they are calling attention to the fact that they are delegating, they are depending to a substantial extent on the careful, meticulous study of the committees. You will recall that letter of transmittal also said, "We are satisfied that the process has worked with integrity in this circumstance and we are forwarding the rules."

I think it was an appropriate element of greater candor and openness that we should welcome.

Mr. SCHIFF. Well—I am sorry.

Judge SCHWARZER. I agree with that. I think the Supreme Court to the extent you want to read between the lines was making clear that they see their function as a veto function, and that they don't arrogate to themselves the difficult task Judge Keeton has described of fine tuning how a rule should be done. They can say there may be different ways of approaching this problem, but it isn't something they wanted to veto.

Mr. HUGHES. Does the gentleman from California have any questions?

Mr. EDWARDS. No, Mr. Chairman.

Mr. HUGHES. You have been very, very helpful. We have taken a lot of time but these are very important issues. I wouldn't want to violate the rule that says "when in doubt, wear them out."

Judge KEETON. We thank you very much, Mr. Chairman. We will remain available.

Mr. HUGHES. Let me again thank you for the excellent work of the committee. We really do appreciate your assistance and your guidance. You have been very helpful to us today. We thank you very, very much.

Judge KEETON. We will remain available both today and later if we can be helpful.

Mr. HUGHES. Thank you very much.

Our second panel is likewise a very interesting panel. The first witness on this panel is John Frank, who is a partner of the law firm of Lewis and Roca, and general counsel to the Arizona Democratic Party. Mr. Frank has been a member of the Rules Practice and Procedure Committee of the Judicial Conference the United States, and has taught at Indiana Law School and Yale Law

School. He has also served on the Arizona Appellate Court Nominating Committee, and was Chairman of the Nominating Commission for the Federal Court of Appeals for the Ninth Circuit. He served as law clerk to Justice Hugo Black during the October 1942 term of the U.S. Supreme Court, and has published extensively on matters of legal history and constitutional law.

Our next witness on the panel is William K. Slate II, president of the Justice Research Institute, appearing today on behalf of the National Court Reporters Association. Prior to his present position, Mr. Slate served as project director for the Public Committee on the Federal Courts Report, Director of the Federal Courts Study Committee, the executive director of the Virginia State Bar, and Circuit Executive of the Third Judicial Circuit of the United States. Mr. Slate has also been in the private practice of law and with the FBI. He has taught and lectured at various universities and has published extensively on a variety of issues.

Our next witness is Judyth W. Pendell, vice president of the Aetna Insurance Co., who is appearing today on behalf of the American Insurance Association. Ms. Pendell has been a member of various organizations involving civil justice reform, including: the Brookings Institution Task Force on Civil Justice Reform; Insurance Advisory Committee to the Institute for Civil Justice at Rand; board member of the National Chamber Litigation Center; chair of the Subcommittee on Judicial Issues, Mass Tort Task Force, United States Chamber of Commerce; and Subcommittee of Procedural Law and Practice, American Insurance Association. She also has published several articles on civil procedure.

Our final witness on the panel is Louise La Mothe, chair of the American Bar Association, section of litigation. Ms. La Mothe is a partner in the law firm of Riordan & McKenzie in Los Angeles, CA. She entered private practice in 1975, after teaching law at the University of Kansas and directing its legal aid clinic. Ms. La Mothe has practiced before State and Federal courts at both the trial and appellate levels.

We welcome each of you to our subcommittee. We have read your statements in full, and they will be made a part of the record in toto. We would like you to summarize for us, because that way we can get right to questions, of which we have many, as you can tell.

Why don't we begin. Let's see, who wants to go first?

Mr. Frank.

**STATEMENT OF JOHN P. FRANK, SENIOR PARTNER, LEWIS
AND ROCA LAW FIRM, PHOENIX, AZ**

Mr. FRANK. Mr. Chairman, members of the committee, I thank you.

I will abbreviate sharply, of course. You have the statement, and your time is precious. Back in the Kastenmeier years I felt I was virtually a member of the family of this committee. Mr. O'Connell has been so cordial in allowing participation here that I can merely applaud, and I do applaud the fact that you are taking early hold of this whole problem.

Let me say first that I do hope that you will let all of these proposals take effect. I have been in the proceeding throughout and I have been in all of the proceedings for over 30 years. I am very

grateful to the fact that Judge Pointer gave us full and fair hearings. My points of view on many matters did not prevail, but I had a fair day in court and a fair-run at it.

Judge Keeton has conducted the proceedings of the standing committee with very great fairness and thoroughness. And at least for me as a member of the bar, it is time to acquiesce.

But I am particularly grateful for the fact that you are taking this up at an early date and not letting it drift.

Now, I have organized my statement first by picking up some 20 or so of the rules which really don't warrant discussion here. There are no controversies. They are small improvements, a good thing to have. The world doesn't come to an end one way or the other. I have outlined them, pages 4 to 8. There are roughly 20 of them. I think they are not terribly important.

There are three rules that are genuinely important, and are not controversial at all, and they are further reason why this package ought to move. Rule 33, limiting the number of interrogatories, is extremely constructive.

Let me confess sometimes a fellow makes dumb mistakes. Maybe I am making another one. In 1983 I resisted putting a limit on the number of interrogatories because I felt we didn't know enough about it. And in an ABA article I did not object to rule 11 because I thought it would be of no consequence. That shows how many mistakes you can make.

The fact is that we do now know from experimentation that the limitation on interrogatories is helpful and economical. The provisions in rule 54 and rule 58 are extremely useful. They deal with the problem that Congress has created and has not yet dealt with. You have over 100 statutes now permitting shifting of attorneys' fees. We have no way of administering those problems, and they are creating great tie-ups and difficulties in the courts, and these rules deal with that.

Let me touch briefly on the major matters in which you have expressed interest this morning. Rule 11 as it was adopted in 1983 has been described by Prof. Charles Alan Wright as the worst self-inflicted wound in the history of the rulesmaking process. It had high purpose and good intentions, but it has worked out as an absolute blight.

In this connection, I wish to make clear that I have been representing the leadership of the litigation section of the ABA, the board of governors, the American Tribal Lawyers Association; and also some 13 State bars, countless judges and professors, and particularly the Procedure Committee of the American College of Trial Lawyers.

I think it is fair to say that in your total experience, and at least in mine, you have never had a bar outpouring as strong as the one as you get now and today and that I am presenting to you and have to the committees, to the effect that rule 11 has worked very, very badly. The fact is that it has created thousands upon thousands of additional cases in the court systems as people quarrel over whether or not there should or should not be sanctions, a factor which will be of some special interest perhaps to Mr. Sensenbrenner because of his earlier questions.

The excellent work of the committee of the Seventh Circuit Court of Appeals on the civility of the bar led by a Wisconsin lawyer has emphasized that rule 11 has contributed materially to the lessening qualities of the relations within the profession. The fact is that under rule 11 as it stands, first you try the case and then you try the other lawyer, and it is malpractice if you don't, and this has created a real clog in the courts.

From the bar for which I am speaking here to an overwhelming extent, I haven't heard a lawyer in America who thinks that this rule 11 is tolerable. It is particularly hard in the civil rights cases and has done great injustice there. The bar for which I was a representative in this matter asks for more radical changes to rule 11 than we got. But what we have is simply a modification of it.

In relation to one of your questions, it has adopted in this rule the language of Justice O'Connor in the *Cooter* case by emphasizing deterrence as the goal, and it has greatly increased the due process.

The plain fact is—let me put this bluntly because it is not a nice thing—the plain fact is that judges like rule 11 better than lawyers do. It is nicer to be a cat than to be a mouse.

But the bar is simply overwhelming on this subject. We come to you asking for relief. And I stress the fact that the number of judges who have severely abused the rule itself has been relatively small. These changes are modest but they are improvements. I would have liked more but I am grateful that we have at least gotten some attention.

Let me touch briefly on rule 26 and rule 30, because your time is too short for any more discussion. With all deference to my good friends, I think the people who are troubled over rule 26 disclosure are spooked over nothing. The fact is that this is very, very modest disclosure of stuff that you are going to have to produce anyway. Anything that speeds litigation ought to be looked at at least with a kindly eye.

The questions were raised about the disclosure in my county of Phoenix, Maricopa County. The fact is my State has a disclosure system so vastly more extensive than this that there is no resemblance. There has been no formal inquiry. If there had, I would say what we have got is a lousy and excessive system. I would have been in line with that point of view.

But the fact is that what is proposed here is really simply answering interrogatories without going to the expense of having to exchange them, identifying document areas. I regard it as essentially tokenism.

I will touch very briefly on rule 30, because that is a problem. The fact is that rule 30 will, to the extent that it permits at option the use of video in connection with depositions, will to that extent eliminate court reporters. But what we have got to face as a reality is technological change occurs in the world, and when it happens it is sometimes obsoletes labor forces. That is a matter for a greater degree of sympathy than I think the committees have shown. They have limited it sharply. It doesn't take the court reporters out of the courthouse.

We have the most experimental work in the country going on I think at the moment in Phoenix, and what is happening there is

that we have a court reporter but we have the video in the actual courtroom and we are seeing the text of the testimony on the screen within seconds of its utterance; and it can be printed off automatically, you can find what you want. And the plain fact is that a nation that can put a man on the moon is not going to let trials be held up for months and months while people hammer out mechanical stuff that doesn't need to be hammered out.

The fact also is that this is an honorable and worthy profession and deserves some protection. I have made the suggestion in my testimony that you give serious thought in any report you have to making clear that for at least a 10-year period, a period of transition, you will not welcome and will not encourage any further action which may have the effect of restricting court reporter functions. This becomes experimental and limited; a period of transition is in order. This is commonly done in industry as technological improvements take place, and you might want to give some sympathetic thought to that.

My main thought, however, is that I hope you move this package. There are so many things here that are really worthwhile that will really help, let it not please be tied up with doubt over details.

Mr. Chairman, I thank you very much.

Mr. HUGHES. Thank you, Mr. Frank.

[The prepared statement of Mr. Frank follows:]

PREPARED STATEMENT OF JOHN P. FRANK, SENIOR PARTNER, LEWIS AND ROCA LAW FIRM, PHOENIX, AZ

My name is John P. Frank and am the senior partner of the law firm of Lewis and Roca in Phoenix, Arizona. I attach my *Who's Who** identification to this statement and will say briefly only that I have my law graduate degrees from the University of Wisconsin and Yale Law School and prior to September 15, 1954, taught law at Indiana University and at Yale, in both schools teaching procedure. I have taught on shorter term bases at various schools in the United States and have lectured, commonly on either constitutional or procedural subjects, in many states. I am the author of numerous books and articles on court administration and procedure and constitutional and legal historical subjects.

I served on the then Supreme Courts Advisory Committee on Civil Procedure by appointment of Chief Justice Warren under the chairmanship of Mr. Dean Acheson from approximately 1960 to 1970. I was a member and from time to time chairman of the Arizona State Committee for Civil Procedure for some thirty years and have participated in and have appeared at all hearings by the Committee on the Rules of Civil Procedure from 1960 to the present time. I have repeatedly appeared before House and Senate committees on jurisdictional and procedural matters.

In connection with the rules presently before this Committee, I have been active in connection with them throughout their several year history. An informal committee consisting of Professor Judith Resnik of the University of Southern California Law School, my partner Janet Napolitano who is now chairman of the Arizona State Committee for Civil Procedures and is our U.S. Attorney designate, and I have variously divided up the rules. In behalf of all of ourselves and of other groups, we presented positions on the various rules at public hearings.

I am, thus, acquainted with all of the rules and have taken a stand on all of them. In our division of labor my particular assignment was Rule 11, the sanctions rule. As I shall elaborate in connection with that rule, on Rule 11 I presented the views of numerous United States Court of Appeals Circuit and District judges, the leadership of the Litigation Section of the American Bar Association, the Board of Governors of the American Trial Lawyers Association, the committee on civil procedure of the American College of Trial Lawyers, and the views of numerous state bars. In this connection I worked particularly closely with the New York Bar and the outstanding chairman of its civil procedure committee, Judge Hugh Jones, formerly of

*The statement was not made a part of the hearing record and is therefore retained in subcommittee files for public review upon request.

the New York State Court of Appeals. I also represented the views of the leadership of civil rights groups on the Rule 11 problems.

I. THE GENERAL VIEW

Permit me to begin by stating two conclusions:

1. I hope that this Committee will conclude to let all of these proposals take effect. The package is not perfect and if I were writing the rules I would not have all of them as they are here. But the procedure has been extremely fair and thorough. We of the bar or of academia, and, indeed, those judges who wished to express themselves, had our innings before Judge Pointer. The hearings were thorough and fair.

The same has been true up the line. Judge Keeton has conducted the proceedings of the Standing Committee with exemplary fairness and thoroughness. He has made himself available for informal discussions. The review by the Standing Committee was very thorough. Moreover, the review by the Judicial Conference of the United States was also far from cursory. Indeed, the Judicial Conference very wisely deleted one rule. I mention that action only to highlight fact that the Judicial Conference review is not perfunctory, but, indeed, represents contemplative judgment.

It is part of the lawyer's job to advocate, and when he has been heard, to acquiesce in the conclusions. The statute permits intervention by Congress at this stage; your role is not perfunctory either. But there is, I believe, no difference so grave that it warrants your always unusual power of intervention.

2. Please permit me to applaud the Committee and its staff for your prompt attention to these rules problems. You have many demands upon your time. While not many of these rules are in the slightest degree controversial, a couple of them are. The rules will go into effect unless adverse action or staying action of some kind is taken before November 1. Your scheduling this hearing so promptly is clear evidence that you are tending to this business without delay. Some of the rules changes are relatively minor, but some of them are genuinely important and the bar and the courts will benefit greatly by your early attention.

II. THE MATTERS NOT WARRANTING DISCUSSION HERE

While the changes are generally improvements, a good many of them do not reach the level which seems to require Congressional attention. While I may be wrong as to some of these, and if so I ask to be questioned concerning them, I will otherwise put aside the following

Rule 1. An amiable piety on the administration of the rules.

Rule 2. Changes in the methods of serving summonses. The rule is intended to promote economy and it probably will. I must in integrity acknowledge to you that I find it a long-winded effusion which will be more nuisance to the bar than profit, and it illustrates the kind of change which I would not of my own motion have made, but its purpose is good and it is not important enough to be worth your attention.

Rule 5. This is a small improvement to permit local courts to permit electronic filing and is clearly a good idea.

Rule 12. This rule on time for response is essentially an adaptation to the new summons rule previously identified.

Rule 15. This is merely a cross reference.

Rule 16. This makes a number of changes in the pretrial conference. It does not truly broaden authority as much as it gives a kind of a checklist or schedule to the court and the parties as to what can come up at the pretrial conference. Rule 16 for some time has been serving fundamentally as such a checklist and this broadens this function. It will be particularly useful for new judges and for the less experienced members of the bar.

Rule 28. This is the detail concerning depositions in foreign countries, conforming that procedure to treaty practice.

Rule 29. This tightens trial scheduling by encouraging parties to work out discovery matters informally except where they would delay trials. It represents what good lawyers have been doing and is a worthwhile encouragement.

Rule 30. The larger portion of this rule deals with electronic depositions and that matter will be discussed separately. But the other changes, in any case, are minor and good.

Rule 31. This is an improvement in the procedures in taking depositions of prisoners; it is not a matter of broad concern.

Rule 32. This essentially conforms the use of depositions to the new procedures for taking them. If Rule 30 were seriously altered, Rule 32 would need attention as well.

Rule 33. This rule limits the number of interrogatories and slightly changes the procedure for objections to them. A similar proposal was made some ten or more years ago at the Committee stage and was opposed by Judge Mary M. Schroeder of the Ninth Circuit Court of Appeals and by me both at the hearing in San Francisco and in an article in the American Bar Association Journal. We then believed that the limitation on the number should be the product of more experimentation at the district courts. The rule was not then adopted. That experimentation has occurred and it is now clear that these limitations are highly beneficial, and moreover that they make litigation much less expensive. I do, therefore, now warmly, however belatedly, endorse this proposal and regard it as genuinely important; interrogatories have grown out of all reason. It is one of the best features of this new series of rules.

Rule 34. This rule on production of documents is simply an adaptation to other changes.

Rule 36. This rule on admissions is, likewise, simply an adaptation to other changes.

Rule 37. This rule deals with the failure to make disclosure or to cooperate in discovery. It is, at least generally, a clear improvement in encouraging cooperation amongst attorneys in solving these problems without burdening the courts with them. It stiffens the sanctions for failure of honest disclosure and I am afraid that this is probably necessary. These changes are generally of some importance and are not believed to be seriously controverted in any quarter.

Rule 38. This is a minor correction in the method of demanding jury trial.

Rule 50. This is a technical amendment on judgments as a matter of law.

Rule 53. This is a very minor adapting change concerning masters.

Rule 54. This is a very important and worthwhile stabilization of procedures for establishing attorneys' fees where they are to be determined by the court. Inch by inch we are moving more and more toward the English rule and are allowing courts to assess counsel fees against losing parties in a number of situations. Congress has adopted some 100 fee-shifting statutes. This development creates a whole new series of legal decisions which need to be made in determining what fees are to be allowed. We have had no clear procedure on this and Rule 54 establishes one. It is particularly constructive because it requires that this matter be settled promptly. This is a big improvement.

Rule 58. This rule on entry of judgment is one of the best features in the whole package. It relates to the attorneys' fees problem and provides that the trial court may merge the judgments on the main case and on the attorneys' fees so that there can be only one appeal and the two matters can be decided together. This solves a major problem and is very valuable.

Rule 71(a). This is some minor conforming detail concerning service in condemnation cases.

Rule 72. This is simply a matter of labeling magistrates.

Rule 73. This is a small but real improvement on the use of magistrates, protecting the parties so that they won't be pushed into accepting a magistrate if they don't really want that method of procedure.

Rule 74. This is another matter of relabeling magistrates.

Rule 75. This is yet another matter relabeling magistrates.

Rule 76. And again, the labels of magistrates.

Summary: Twenty of the rules are minor changes which will be useful but which probably do not deserve thought from this Committee. Rules 33, 54 and 58 are very important. Because there appears to be no dispute concerning them, the Committee may not wish to give them any further consideration. But they are different from the first group in the sense that they are truly important and the bar and the courts really need them, and need them now. They are reasons for moving this package along.

III. THE MAJOR CHANGES

A. Rule 11

Rule 11, as adopted in 1983 and enforced today, has been described by Professor Charles Alan Wright as the worst self-inflicted wound in the history of the rules-making process. It has been a blight. Seldom was an effort made with better intentions or higher purposes, but, as has been trenchantly observed by Professor Judith Resnik of the University of Southern California, most of the time rules reformers are mopping up after the mistakes of past rules reformers; and Rule 11 is a brilliant example.

Rule 11 is a genie which came out of a small bottle and filled all available space. No one would have supposed in 1983 that it would be so consequential. The rule

is short and in both prose and intention benign. It provides that every pleading, motion and other paper must be signed by the attorney and if there is no attorney, by the party. The signature then becomes a certificate that the attorney has made a reasonable inquiry and that to the best of his or her knowledge, information and belief, the document is well grounded in fact and warranted by existing law or represents a good faith effort to alter existing law. If the pleading or motion or other paper is found to have been signed in violation of the rule, the court is authorized to impose an appropriate sanction which includes an order to pay to the other party the reasonable expenses involved in countering the pleading, including attorneys fees.

Great oaks from little acorns grow. In the less than ten years since the adoption of Rule 11, we have had thousands of cases invoking its application. Asking for sanctions because of challenge to the allegedly good faith inquiry into either facts or law has become a major industry. It has become routine that the attorneys now have a double duty, one to try the case and the other to try the opposing counsel.

The rule has become more of a defendant's mechanism than a plaintiff's, but the defendants have not liked it either. Approximately 75% of the sanction applications are against plaintiffs. Nonetheless, there are enough against defendants to create a mutual burden. Indeed, the Rule 11 operation is just as obnoxious to the leaders of the defense bar as it is to the plaintiff's bar. The root goal is the desire to sanction frivolous cases. The underlying problem here is that the phrase "frivolous cases" has a happy ring to it as though it were saying something meaningful, when in truth this is false. One judge's frivolous case is another's serious question. In a Federal Judicial Center study, a group of judges who considered the same complaint divided fifty-fifty on whether it was frivolous.¹

The system has been particularly onerous on civil rights plaintiffs.

I am aware of statements from the Federal Judicial Center that the use of Rule 11 in civil rights matters is not "disproportionate." This depends on how one measures disproportionate. It is perfectly true that in the FJC study there are more Rule 11 motions in contract and tort cases than in civil rights cases. However, there are also vastly more contract and tort cases than civil rights cases to start with. The percentage of civil rights cases with Rule 11 sanctions is higher than the percentage in tort and contract cases. When we allow for these circumstances, civil rights plaintiffs are big losers.

I do not pause with what I think are the substantive misfortunes under Rule 11 because the point that particularly concerns me is what I think the grossly unreasonable and unwholesome burden it has added to judicial administration. The American Judicature Society has done a major study. That study reported that in 7.6% of the cases studied there were Rule 11 sanctions and in 24.3% there was some involvement without sanctions. That meant that there had been some kind of Rule 11 activity of a formal enough sort to be noticed in a third of the cases. This in turn means that a great number of time-consuming and dollar-consuming decision points have been put into the legal system.

When the attention goes from the frequency of Rule 11 in a batch of cases to the frequency of Rule 11 problems for lawyers in general, the American Judicature Society comes up with the astonishing figure that 82% of the bar studied has had some Rule 11 contact. This is a terrible and costly burden to put on the profession. It is particularly undesirable because under Rule 11 there are no uniform standards. As I have mentioned, one Federal Judicial Study, judges divided fifty-fifty as to which cases were and which were not frivolous.

The Judicature Society also speaks of the threat element in the Rule 11, as lawyers charge each other. In the Seventh Circuit study on the rising incivility of the bar, an appreciable part of it dependent on Rule 11 combat, illustrates the vices of this system. Exchanges between lawyers of the "I'm going to get you" variety don't help civility very much.

It is, in short, a bad rule and needs changing.

As against that background, I had the pleasure and opportunity to be coordinator on the Bench-Bar proposal to revise Rule 11. I append a list of those who sponsored the Bench-Bar proposal. It included an astonishingly complete representation of the bar, the Litigation Section, ATLA, the College of Trial Lawyers, numerous state bars, and numerous judges and professors; the list will speak for itself. We asked for a very comprehensive revision of Rule 11.

We did not get what we asked for. I regret that. The plain fact is that the Rule 11 dispute reflects class difference within the profession. Most of the judges who have the Rule 11 power like it. The lawyers on whom it is exercised or feel its consequences do not. In the world of cats and mice, it is more attractive to be a cat.

¹J. M. Kassenkissen, *An Empirical Study of Rule 11 Sanctions*, 26 (1985).

This is illustrated in the dissent by Justices Scalia and Thomas from even the modest Rule 11 changes which are now before you.

Nonetheless, while the changes are less than I would have liked, the improvements are noteworthy. A strenuous concern of the American College of Trial Lawyers was the provision in the 1983 rule that sanctions were mandatory. If the judge found any of the triggering circumstances existed, the court had no discretion to waive the sanctions but was compelled to impose them. That aspect is changed by the new rule. Another improvement is that the sanctioning power is broadened to cover firms as well as persons who actually sign documents in court. Frequently the signer is a junior attorney who is simply doing what he is told. He is not a policy maker. It would have been better to eliminate any sanctions on such persons, but at least now the courts will have discretion to put the responsibility where it belongs, which is on the firm itself.

The worse feature of the 1983 rule, which I have already mentioned, is that the rule became a fee-shifting device so that the prevailing lawyer was required to try to get his fees out of the losing lawyer's side. The Bench-Bar proposal urged that any sanctions under the rule should be paid into court. That proposal was not entirely adopted in the new rule but long steps were taken in that direction. The Court adopted the views of Justice O'Connor in a recent opinion that there should be heavy stress on deterrence and not profiteering as the objective of the rule. Hence, the Committee has provided that any sanctions "should ordinarily be paid into court as a penalty" and that fee shifting should be limited to "unusual circumstances." This is an improvement. In addition, the new rule provides that there shall be no sanctions if the offending pleading is withdrawn, and the objecting party must give the other side this opportunity. A major improvement in the rule is its improvement on the notice, hearing and determination practices required before sanctions will be allowed. Anybody sanctioned must have a specific charge, must have a reasonable opportunity to respond, and the court must show its reasons on the record for any order it makes. This is particularly important because the court's order is reviewed only for abuse of discretion, so there must be a record to show whether discretion has been abused.

I am aware of no one who will come before you criticizing the proposed new Rule 11. It is greatly desired by every segment of the bar and particularly by civil rights groups. The existing situation is simply intolerable. The proposed new rule is urgently needed and merits your blessing.

B. Rule 26

I supported Rule 26 in an earlier form before the Rules Committee and support it in its highly modified form now. I am aware that the procedure by which the final form of Rule 26 came into the rules was out of the ordinary, and I do not think it is right. However, the present form of the rule is sufficiently modest in the changes it makes that further hearings would probably not have shed any new light; the earlier discussions had been very thorough.

Specifically, I think my colleagues the bar who are troubled at this Rule 26 are spooked over nothing. The plain fact is that disclosure is the contemporary wave. The disclosure system adopted in my own state of Arizona is so much more radical than this that the proposal before you seems child's play. Disclosure is being adopted by district courts under the 1990 statute and no one seems to have been hurt by it.

Let me be very specific. Federal proposed Rule 26 imposes three types of disclosure duties:

1. *Initial disclosure* of individuals likely to have discoverable information relevant to disputed facts; copies of or descriptions by category of all documents in the disclosing party's possession, custody, or control relevant to disputed facts; damages evidence; and insurance agreements. (26(a)(1)).

2. *Expert testimony*, including the identity of experts as well as required written reports. (26(a)(2)).

3. *Pretrial disclosure*, including the identity of witnesses and whether they will be presented live or by deposition and the identity of anticipated trial exhibits. (26(a)(3)).

The proposed rule also sets forth the timing requirements for each of these disclosures, the method for making each of these disclosures, and the method for claiming attorney-client or work product protection.

All these things have to be done now, though at a slightly later stage. These rules simply accelerate the interrogatory procedures of Rule 33 and the document disclosures of Rule 34, plus the various details of Rule 26. Of course one must identify one's witnesses and identify the trial exhibits and reveal the expert testimony and

reveal the facts of insurance. The question, therefore, is not one of substance but purely one of timing.

The questions then arise as to whether somehow the earlier timing works an injustice. This must be balanced against the fact that lawsuits take too long and there is too much jockeying around now about interrogatories and documents. The rule is carefully designed so that no one has to discover what he doesn't yet know; there are adequate devices, as there are in the existing rules, for supplementation and there is plenty of room for protection. The country is impatient with the pace of litigation and the cost of it, and it is at least reasonable to hope that this Rule 26 will speed the pace and reduce the cost; it may by earlier cards on the table improve the prospects of early settlement.

The question then arises as to whether this rule should be delayed until there are further reports under the 1990 statute. This question can be twice answered in the negative: first, the local experimentation permitted under the 1990 statute continues unaffected by this rule. Second, this rule may well give the local districts a model with which to complete their tasks under the 1990 act.

This rule speeds up discovery and will take away much of the gamesmanship of evasive answers to interrogatory questions. It is to be commended.

C. Rule 30

The rule permits the taking of depositions by non-stenographic means, as by videotape. It also provides that if the deposition is to be used to that extent, it eliminates the court reporting or stenographic function at the deposition. However, if the deposition is going to be used in court, other rules require that it be transcribed and then a copy be furnished to the court.

The benefits to the rule are that, by making maximum use of modern technology, the procedure makes deposition much more vivid and far less expensive. In jury cases, the videos may be used to present the deposition testimony to the jury even though a transcript must be lodged with the court to perfect the record and for the convenience of a reviewing court. The incidental cost savings are also considerable; the doctor, for example, can be videotaped, charts and all, in his office.

In short, the rule permits the benefits of the electronic age to enter the courtroom; but there is a clear downside. As with the development of all machines to replace other labor forces over the centuries, there is whatever gain the machine gives but there is the loss of jobs to the labor force. Court reporters have done this work for a long time. Now on depositions which will not be used in court, they will never be involved and, even where the deposition is to be used in the court, the stenographic transcript can be made at lower pace by office staff. A whole industry may be badly damaged or rendered obsolete.

Frequently the obsolescence of the labor force by the progress of the machine or by new methodologies can be softened by job preservation techniques. For illustration, when the shipping industry thirty years ago moved to containers, it rendered the longshoremen largely obsolete but the industry provided that the existing longshoremen should be kept on the job until they reached retirement age so that the phase-out would be gradual. The problem with any phase-out here is that it puts a great cost on litigants for absolutely superfluous services.

If the Rules Committees have given any thought to the phase-out problem, I am unaware of it. The court reporters of the nation commonly are skilled people, trained in their work, and, within my experience at least, overwhelmingly capable and faithful to the tasks they have undertaken. Yet come December 1, for the large discovery phase of their work, it is bye-bye court reporters.

The court reporters themselves may have some proposal to make the transition less painful and if 90, it deserves careful consideration. My own suggestion is a timid one and I would withdraw it if the court reporters, to whom I have not spoken, reject it. But the fact is that the same obsolescence which hits the court reporters in discovery will do the same for trial. Trials, too, can be, and on occasion are, videotaped, and there is no need for a transcript except in that relatively small number of cases which are appealed. Moreover, the new machines permit electronic re-creation of the testimony simultaneously with its utterance; a Phoenix federal judge has a video system in his courtroom in which the court reporter records to a computer and the testimony is on a screen within seconds of its utterance. The computer record can be searched to find the relevant objection or instruction, and the rest will never even need to be printed. Moreover, there is today advanced work on straight voice to computer.

I diffidently suggest to the Committee that it include in any report on these rules a recommendation to the rule-making authorities that no rule eliminating trial transcripts for at least a ten-year period will be welcome here. This would permit a reasonable transition. Newcomers to the profession can stop learning it if they feel it

has no economic future. The present work force will have reasonable opportunity to plan retirement or to transfer to other work; I believe there are schools now for court reporter transition. I repeat, I take no pride in my particular suggestion; I propose it only to create a mood. It is always cruel when a new machine throws employees out of the work force, and if ingenuity can make that eviction less painful, it should be welcomed.

I thank you for the opportunity to appear before you. I summarize again by saying that while many of these rules are sufficiently minor or accommodating to other changes so that they are merely useful, a number of them are of truly high value and are either not controversial at all or not seriously so. Rules 11, 33, 54 and 58 are seriously needed now. While Rule 11 drew the dissent of two Justices, I hope that the anxiety of the bar for this change, coupled with the total absence of any resistance here, will permit you to accept this rule comfortably. I commend Rules 26 and 30 to you, with the hope that perhaps you can make some softening legislative history to ameliorate the personal losses under Rule 30. Because so much of this package is truly necessary and needed now, I repeat my initial admiration for the promptness with which you are taking hold of this problem.

One last phase I have not discussed and that is the opinion of Justice White suggesting that the Supreme Court be dropped out of the rules-making procedure altogether. This, were it to be done, would take an independent statute. I believe that a bill to this effect should be introduced and should be the subject of separate and independent hearings since there is nothing you can do on the topic in connection with the matter immediately before you. There are other changes which should be made in the Rules Enabling Act which ought to be considered at the same time. It would be a privilege to be allowed to make suggestions to you on that score if you are giving thought to a revisory bill. But that is a topic for another day.

Meanwhile, thank you very much.

**BENCH-BAR COMMITTEE TO REVISE
CIVIL PROCEDURE RULE 11**

Robert G. Begam, Esq., President, ATLA, 1976-77
 James E. Carbine, Esq., Baltimore, Maryland
 Edmund L. Carey, Jr., Esq., Nashville, Tennessee
 Professor Erwin Chemerinsky, University of Southern California Law Center
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 Judge Patrick Higginbotham, Fifth Circuit Court of Appeals
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 Professor Michael E. Tigar, Chairman, ABA Litigation Section, 1989-90
 Professor Georgene Vairo, Fordham University School of Law
 Bill Wagner, Esq., Tampa, Florida

Mr. HUGHES. Mr. Slate, welcome.

STATEMENT OF WILLIAM K. SLATE II, PRESIDENT, JUSTICE RESEARCH INSTITUTE, ON BEHALF OF THE NATIONAL COURT REPORTERS ASSOCIATION

Mr. SLATE. Thank you.

Mr. Chairman and members of the subcommittee, I address you today on why proposed rule 30(b)(4) of the Federal Rules of Civil Procedure governing depositions should not be changed as proposed in the amendments now before you.

The chairman alluded to this, but I come to these issues from the perspective of an executive in State and Federal courts, and as the head of an institute which does research and provides management advice almost exclusively to State and Federal courts.

Virtually the sole exception to the work for court systems by the institute has been several studies of the methods of making a trial court record and taking depositions, which were performed on behalf of the National Court Reporters Association. It is specifically with respect to two of those studies conducted within the past year regarding the cost of depositions and depositions and accuracy that form the basis of my remarks here today, and with the consent of the committee, Mr. Chairman, I would hope that these studies may be made a part of the record.

Mr. HUGHES. Without objection.

[The studies appear in appendix 1.]

Mr. SLATE. Thank you.

We have concluded the case is overwhelming for the maintenance of the Federal rule in its present format, for neither the enhancement of accuracy nor a reduction in civil litigation costs will be achieved by a rule which encourages nonstenographic methods such as audio or video to be a substitute for taking a deposition without a court order or by stipulation of the parties.

First of all, with respect to accuracy, we have concluded in our studies that both historically and at the present a court reporter deposition is the qualitative standard for accuracy and clarity. A court reporter's goal is verbatim transcription. That is the Federal standard.

Videotaped transcription, by contrast, has sought and been content with a standard based on the concept of faithfulness or a faithful representation of what was said at a legal event.

I submit to you, gentlemen, that accuracy and faithfulness on their face are not synonyms.

Further, the deposition process, we maintain, should not be relegated to a lesser standard than other aspects of court proceedings. It shouldn't be lost on any of those considering rules-related changes to depositions that depositions admitted at court must invariably be in transcript format. Trial courts require court reporters for important cases; and appellate courts in the Federal court system and, almost without exception the State courts will not permit videotapes only, but require hard-copy transcription.

Also, I think it is important for the committee to think about the fact that in the course of our research into notions of accuracy, it became clear that the literature, when addressing problems and issues associated with the various taping methodologies, including

inaudibles, indiscernables, and equipment failures, all occurred in courtroom settings under the most controlled conditions presided over by a judge.

Similar problems occurring in the deposition process outside of a structured courtroom setting will substantially exacerbate the negative results. A key witness or expert testimony cannot be transcribed weeks or months after it was taken.

Finally, in respect to accuracy, attorneys in our study expressed the view that the most serious potential miscarriage of the use of videotaped depositions is the absence of any standards or rules for taking depositions or for using them in court. Neither do standards exist for taped transcribers. Indeed, attorneys in all the jurisdictions that we studied advised that video was a valuable strategic tool which could be manipulated to make a certain impact on a jury.

Additionally, the future accuracy, if you will, as related to the long-term life and dependability of tapes, is literally unknown. The National Archives and the Library of Congress are studying the issue, but no credible source—the only exception is vendors—is willing to even venture a qualifying estimate of the life of a tape.

And what about the second compelling issue of cost to litigants and to the courts themselves? This past year, the Justice Research Institute conducted a cost-benefit analysis of all relevant costs in the deposition process, utilizing audio recording, court reporters using computer-aided transcription equipment, and video recording. Because there is rightly a desire today to bring the cost of litigation under closer scrutiny, we employed a standard cost-benefit analysis approach, because it concentrates attention on basic issues.

After an exhaustive literature review, we conducted onsite analysis and data checks in three geographically diverse areas, Alabama, California, and New Jersey, and conducted in-person interviews with attorneys in government and in private practice representing both plaintiffs and defendants, as well as with freelance court reporters, audiotape and videotape transcribers.

In addition to a number of accepted direct cost centers associated, such as the cost of taking and transcribing a deposition, we found a number of hidden costs. A hidden cost is defined as a cost associated with producing or utilizing the deposition which is not patently visible, is less obvious than a direct cost, and is a cost which may be shifted to government at large, taxpayers, attorneys, or litigants themselves.

Hidden costs associated with audio and video included the time consumed by trial and appellate judges in reviewing the tape; and the cost to the litigants of additional time to review tapes by trial counsel, which attorneys have estimated increased by a factor of three to four times in order to review and study a tape in preparation for a trial, in contrast to hard copy.

The FBI was recently quoted in an article as indicating their view that the time increase to review tapes, as opposed to real time, is an increased factor of 8 to 10. Somebody is paying for those costs, gentlemen.

Other hidden cost factors include the cost of rental or purchase of playback equipment by witnesses, the cost of playback equip-

ment in judges' chambers, and the cost of playback equipment in attorneys' offices, government attorneys and private counsel.

After inputting all the data collected, the cost-benefit analysis model revealed that the cost of recording a deposition by a court reporter using computer-aided transcription equipment is the least costly method across the board. This is true whether the deposition is taken and the case settles or whether a transcript is subsequently made of an audiotape or videotape, or even in the rare instance where an audiotape or videotape is utilized without a transcript in court.

As has been alluded to a number of times today, the Civil Justice Reform Act of 1990 admonishes the courts to fashion ways to reduce the cost of civil litigation. Thus, it would be contrary to other cost reduction movements within the third branch to undertake an initiative inherent in the proposed changes to 30(b)(4) that would in fact increase the cost of civil litigation.

Quickly, the third and final set of facts that I will reference today in support of the soundness of the existing rule concerns depositions and computer technology. A paramount issue to be addressed in the strategic and long-range planning for the Federal courts is consideration of not only the technology presently available, but all foreseeable future technologies.

In one respect the future is known. The microcomputer is in the forefront and has invaded virtually every aspect of business and society. It will be the cornerstone of future technologies.

With this in mind, it is difficult to imagine that a court system, through its procedural rule apparatus, would encourage stand-alone audio or video technology, the kind of single-purpose technology that will very soon be obsolete when compared to computer-based operations.

Now, Mr. Frank referred earlier to the system that is going on right now in Judge Roger Strand's courtroom in California. It is a computer-integrated courtroom utilizing a court reporter; it is not video technology. It is a television monitor that displays the written word on the TV monitor for all the party participants to see in "real time;" as the stenographer types into the stenograph machine, the actual words in the English language appear on the TV screen. This is a computer-based court reporter system.

And, gentlemen, I say to you in all due respect, in many ways the debate has already moved beyond the discussion here today about audio and video, because the future is about a computer-driven system, and that involves a stenographer and computer-aided transcription, and indeed, again, as Mr. Frank referred to, a computer-integrated courtroom.

So I say to Congressman Coble, sir, you may be a 19th century gentleman, but you are also a 21st century one, in that audio and video standing alone is a present-day technology that court reporters have moved beyond through the development of computer-integrated courtrooms.

I would say also with regard to this computer-centered court reporter technology, that it has braille capability, and it is in fact the same software that Donald Anderson, the Clerk of the House, is employing in the new braille letter-writing services that have been available to the Members of the House since January.

So I would reiterate in summary, that in addition to thinking about the importance of a computer-enhanced system that opens up court proceedings and complies with the Americans with Disabilities Act, that it also clearly, from our research, is a less costly system and a more accurate system.

So for the foregoing reasons, we conclude the case is overwhelming, gentlemen, for the maintenance of the Federal rule in its present format. Again, neither the enhancement of accuracy nor reduction in civil litigation costs will be achieved by a rule permitting a nonstenographic method such as audio or video to be used as a substitute for taking a deposition without a court reporter, or, by stipulation of the parties as is available in the existing rule.

Thank you very much.

Mr. HUGHES. Thank you very much, Mr. Slate.

[The prepared statement of Mr. Slate follows:]

PREPARED STATEMENT OF WILLIAM K. SLATE II, PRESIDENT, JUSTICE RESEARCH INSTITUTE, ON BEHALF OF THE NATIONAL COURT REPORTERS ASSOCIATION

I appear here today to discuss why proposed Rule 30(b)(4) of the Federal Rules of Civil Procedure governing depositions should not be changed as proposed in the amendments to the federal rules now before you.

I address these issues from the perspective of my experience as an executive in state and federal courts and as the head of an institute which does research and provides management advice almost exclusively to state and federal courts. Virtually, the sole exception to work for court systems proper by the Institute has been several studies of the methods of making a trial court record and of taking depositions, which were performed on behalf of the National Court Reporters Association. It is specifically with respect to two studies conducted within the past year regarding depositions and accuracy and a cost-benefit analysis of the several methods of taking a deposition which are the basis for my remarks before you today as related to Rule 30(b)(4). We conclude that the case is overwhelming for the maintenance of the federal rule regarding depositions in its present format and for not enacting proposed Rule 30(b)(4). Neither the enhancement of accuracy nor a reduction in civil litigation costs will be achieved by a rule permitting a non-stenographic method, such as audio or video, to be used as a substitute for taking a deposition without a court order or stipulation by the parties.

ACCURACY SHOULD BE THE STANDARD FOR SELECTING A DEPOSITION METHODOLOGY

In our study of all extant sources on the subject of accuracy, we concluded that both historically and at the present a court reporter deposition is *the* qualitative standard for accuracy and clarity. A court reporter's goal is verbatim transcription—that is the federal standard. Videotaping transcription, by contrast, has sought and been content with a standard based on the concept of "faithfulness," or a faithful representation of what was said at a legal event. "Accuracy" and "faithfulness" on their face are not synonyms.

Further, the deposition process should not be relegated to a lesser standard than other aspects of court proceedings. It should not be lost on policy makers considering rules related to depositions that depositions admitted at court must invariably be in transcript format; trial courts require court reporters for "important" cases; and appellate courts, in the federal court system, and almost without exception in state court systems, will not permit videotapes only, but require hard-copy transcription.¹

Also, in the course of our research into notions of accuracy, it became clear that the literature, when addressing problems and issues associated with taping methodologies, including "inaudibles," "indiscernibles" and equipment failures, all occurred in courtroom settings under the most controlled conditions presided over by a judge. Similar problems occurring in the deposition process, outside of a structured courtroom setting, will substantially exacerbate the negative results when a key witness or expert testimony cannot be transcribed weeks or months later.

¹ While audio depositions are possible, we have found only one instance of their use in all of our empirical research and interviews with judges, attorneys, court reporters and transcribers.

It is intuitive that multiple players in the deposition process, i.e., a videotape operator and a transcriber, enhance the likelihood of errors, "unintelligibles" and "inaudibles."

Finally, in respect to "accuracy," attorneys in our study expressed the view that the most serious potential miscarriage of the use of videotape depositions is the absence of any standards or rules for taking depositions or for using them in court. Neither do standards exist for tape transcribers. Indeed, attorneys in all jurisdictions studied advised that video was a "valuable strategic tool which could be manipulated to make a certain impact on a jury."

Additionally, the "future" accuracy as related to the long-term life and dependability of tapes is literally unknown. The National Archives and the Library of Congress are studying the issue, but no credible source (the only exception is vendors) is willing to even venture a qualifying estimate of the life of a tape. It is known and documented that tapes become brittle and "bleed through" unless kept in climate controlled conditions free of dust and humidity. In an earlier study conducted by the Institute, we documented the fact that tapes are usually kept on open shelves or, at best, in metal filing cabinets even when they are stored in courthouses.

COST CENTERS ATTENDANT TO TAKING AND USING A DEPOSITION

The historical notes to the Federal Rules of Civil Procedure 30(b)(4) declared in 1970 that provision is made for the recording of testimony by other than stenographic means to "... facilitate less expensive procedures . . ." Significantly, there is not empirical evidence to indicate why the drafters presumed that methods other than stenographic means would, indeed, be less costly. The historical notes do continue, however, by explaining that because electronic or photographic means "... give rise to problems of accuracy and trustworthiness, the party taking the deposition is required to apply for a court order . . ."

The Justice Research Institute in 1992 conducted a cost-benefit analysis of all relevant costs in the deposition process utilizing audio recording, court reporters using computer-aided transcription equipment, and video recording. Because there is rightly a desire today to bring the cost of litigation under closer scrutiny, we employed a cost-benefit analysis approach because it concentrates attention on basic issues. It also tests the "soundness" of proposed activities by a calculation of the value of the resources to be employed in them (the cost) which is compared with the value of the goods or services to be produced (the benefit). After an exhaustive literature review, we conducted on-site analysis and data collection in three geographically diverse areas and conducted in-person interviews with attorneys in government and in private practice (representing both plaintiffs and defendants), as well as with freelance court reporters, audiotape and videotape transcribers and video technicians.

In addition to a number of accepted direct cost centers, such as the cost of taking and transcribing a deposition, we found a number of "hidden costs". A "hidden cost" is defined as a cost associated with producing or utilizing a deposition which is not patently visible, is less obvious than a direct cost, and is a cost which may be shifted to government at large, tax payers, attorneys or the litigants themselves. Hidden cost centers associated with audio and video included the time consumed by trial and appellate judges in reviewing a tape, the cost to the litigants of additional review time of tapes by trial counsel which attorneys have estimated increase by a factor of three to four times in order to review and study a tape in preparation for trial in contrast to hard-copy transcript, the cost of rental or purchase of playback equipment by witnesses, the cost of playback equipment in judges chambers, and the cost of playback equipment in attorneys offices (government attorneys and private counsel).

After inputting all the data collected, the cost-benefit analysis model revealed that the cost of recording a deposition by a court reporter using computer-aided transcription equipment is the least costly method across the board. This is true whether the deposition is taken and the case settles, or whether a transcript is subsequently made of an audiotape or videotape or, even in the rare instance, where an audiotape or videotape is utilized without a transcript in court.

THE CIVIL JUSTICE REFORM ACT OF 1990

Since the taking of a deposition by a court reporter using computer-aided transcription equipment is less costly than employing audiotape or videotape, it is fully compatible with the admonitions of the Civil Justice Reform Act of 1990 to reduce the cost of civil litigation. That legislation admonished the judicial branch to fashion methods and procedures which bring about a reduction in the cost of civil litigation. Thus, it would seem contrary to other cost reduction movements within the Third

Branch to undertake an initiative inherent in proposed changes to FRCP 30(b)(4) which would, in fact, increase the cost of civil litigation.

Once the quantitative issues have been fully satisfied, the qualitative case for a deposition prepared by a court reporter using computer-aided transcription equipment is seen in overwhelming terms. The hard-copy transcript is clearly the most efficient vehicle for judges and lawyers who are trained to review the written word. Additionally, the automated features of depositions on computer disk enable that medium to be used in the most advanced and technologically based courtrooms of the present and of the future.

DEPOSITIONS AND COMPUTER TECHNOLOGY

A paramount issue to be addressed in strategic and long-range planning for the federal courts is consideration of not only the technology presently available, but all foreseeable future technologies.

In one respect, the future is known. The microcomputer is in the forefront and has invaded virtually every aspect of business and society. The microcomputer will be the cornerstone of future technologies.

With this in mind, it is difficult to imagine that a court system through its procedural rules apparatus would encourage stand-alone audio or video technology. That kind of single-purpose technology will very soon be obsolete when compared to computer-based applications.

Stenographic reporters using computer-aided transcription equipment (CAT) employ the most advanced current technology for making a record.

Indeed, in terms of how a deposition which is computer technology based fits into court proceedings, the debate has already advanced beyond today's discussions about audio and video.

Both the industry and state and federal courts have already stepped into the next generation in creating computer-integrated courtrooms (CIC).

The computer-integrated courtroom incorporates CAT technology and real-time reporting, along with other available computer technology, software and services. This combined technology provides computer access in the courtroom for judges and attorneys to review testimony and case documents, and to utilize case law research systems. With the use of real-time translation in a CIC, technology is in place to conduct court proceedings in which hearing impaired witnesses, litigants, or other parties are involved.

In real-time reporting, a court reporter's CAT equipment is utilized so that as the reporter writes on the stenotype machine, the English translation of what is said instantaneously appears on monitors located in the courtroom, conference room, or elsewhere. Using real-time translation, experienced CAT writers achieve more than 98 percent accuracy, enough for complete comprehension.

A CIC courtroom also has the capability to produce or read records, including depositions, in Braille.

Indeed, the importance of the ability to communicate in Braille was noted in the May 17, 1993 issues of *Roll Call* when House clerk Donald Anderson discussed the new Braille letterwriting services now available to House members, which was commenced in January. A capability to communicate in Braille is once again computer driven. Neither audiotape nor videotape methodologies for making a record have the capability to produce a document in Braille.

Stated in a summary way, because a computer-centered operation is the decisionally sound and economically sensible direction for court systems to take now and for the foreseeable future, the encouragement for any other methodology is a stopgap measure which will forestall systemic progress and the enhancement of computer-based information transmission between courts, government, and the private sector.

AMERICANS WITH DISABILITIES ACT OF 1990

The increased use of audiotaping and videotaping of depositions will further limit the rights of the hearing impaired and the visually impaired by preventing equal access for them to participate in all phases of the judicial system as judges, trial lawyers, jurors, witnesses, and litigants. The court reporter computer-aided transcription (CAT) system, used by over 85 percent of the court reporters, is the same system used in the House and Senate of the Congress of the United States. It is fully compatible with the mandates of the Americans with Disabilities Act of 1990, affording accessibility to the judicial system for the millions of Americans who are hearing impaired or blind.

WOMEN, MINORITIES AND EMPLOYMENT

The change in Rule 30(b)(4) would weaken a profession of more than 40 thousand Americans by replacing people, who have retooled themselves into computer literacy at their own expense, with limited capacity technology equipment.

More than 85 percent of those people (court reporters) are women, and 16 percent are minorities, yet equal pay has been maintained on a competitive basis.

For the foregoing reasons, we conclude that the case is overwhelming for the maintenance of the federal rule regarding depositions in its present format and for not enacting proposed Rule 30(b)(4). Neither the enhancement of accuracy nor a reduction in civil litigation costs will be achieved by a rule permitting a non-stenographic method, such as audio or video, to be used as a substitute for taking a deposition without a court order or stipulation by the parties.

Mr. HUGHES. We have a vote in progress, so I think this is probably a good time to take a break. It will take us about 10 minutes to get back. We are going to recess for some 10 minutes.

[Recess.]

Mr. HUGHES. The subcommittee will come to order.

I apologize for these interruptions, but unfortunately we are going to continue to have a series of votes, because we have legislation on the floor. We are going to try to keep the interruptions down to a minimum. It is my intent to continue so that we can complete the testimony. I know that some of the witnesses have planes to catch, and so to try to accommodate schedules we are going to go through and not break for lunch. That is my intent.

Ms. Pendell, welcome.

STATEMENT OF JUDYTH W. PENDELL, VICE PRESIDENT, LAW AND REGULATORY AFFAIRS, AETNA LIFE AND CASUALTY CO., ON BEHALF OF THE AMERICAN INSURANCE ASSOCIATION

Ms. PENDELL. Thank you. I will make my comments very brief.

I am here today on behalf of AIA, the American Insurance Association. We appreciate very much the ability to appear before you and express our views.

I would like to add that both the U.S. Chamber of Commerce and the National Association of Manufacturers have sent you letters endorsing our comments, which focus solely on rule 11, and our concern with what we perceive to be a dramatic weakening of the rule.

Because you have read our statement, I am going to say little that is reflected in the statement. I would like to respond somewhat to what was said earlier by Attorney Frank by simply noting some of the results of a study the Federal Judicial Center did on rule 11.

This was a survey of 583 Federal judges, and when asked whether or not rule 11 has led to costly satellite litigation, 72 percent of the judges said the benefits of rule 11 outweigh any expenditure of judge time. Sixty percent said few or none of the requests for rule 11 sanctions have themselves been groundless. And 92 percent said few of the rule 11 requests create a conflict of interest between attorney and client. So they don't perceive there to be a real problem relative to litigation.

Ninety-five percent of the judges said that rule 11 had not had a chilling effect on the development of the law. Eighty-one percent said that overall amended rule 11—"amended" meaning the 1983 amendments—has had a positive effect, and 80 percent of the judges say it should be retained in its present form.

The study also revealed that rule 11 is in fact used rarely, but it is our view as clients that it does have a significant deterrent effect, and that is something that is immeasurable, what suits never get filed because there is a rule 11 in existence which really has some teeth.

I would like to adjust one other bit of statistic here that I think it is useful for the committee to consider. The American Judicature Society has also done a study of rule 11, and it, too, is recent and I think something I would commend for your review. That study revealed that the current rule is having a pervasive impact on lawyers' practice, particularly in prompting lawyers to engage in increased prefilng review of factual matters.

On the question of rule 11's effect on their practice in general, the most frequent reaction of the lawyers who were surveyed was that 32 percent of the plaintiffs' lawyers and 39 percent of the defense lawyers said they did an extra prefilng review of pleadings, motions or other documents prior to filing. And we think that this stop-and-think approach to litigation is essential.

We are very concerned about the permissiveness of the safe harbor provision. We do think that, like Justice Scalia, that the rules should be solicitous of the abused and not the abuser. We do think that the rules should exist to encourage prefilng investigation. We think that sanctions should be mandatory.

And we think that it does not serve the interests of justice when a defendant has been the subject of a frivolous lawsuit, has been required to fund a defense, and then receives no compensation for that money that was paid out of pocket or paid by the insurer to defend against that frivolous lawsuit.

So, in summary, I would say we are very pleased with the rule and very concerned about its weakening.

Mr. HUGHES. Thank you very much.

[The prepared statement of Ms. Pendell follows:]

PREPARED STATEMENT OF JUDYTH W. PENDELL, VICE PRESIDENT, LAW AND REGULATORY AFFAIRS, AETNA LIFE AND CASUALTY CO., ON BEHALF OF THE AMERICAN INSURANCE ASSOCIATION

Mr. Chairman and distinguished members of the Subcommittee, my name is Judyth W. Pendell, and I serve as Vice President—Law and Regulatory Affairs, Aetna Life and Casualty and I am testifying on behalf of the American Insurance Association (AIA). AIA is a national trade association representing more than 250 insurers which write a large portion of the nation's property/casualty insurance business. AIA's member companies are substantially involved in civil litigation, when they defend the interests of their policyholders, when they pursue their policyholders' rights through subrogation, when they are involved in coverage disputes, and when they appear as plaintiff or defendant in a wide range of commercial litigation.

I am pleased to have the opportunity to speak to you, today, regarding the proposed changes to the Federal Rules of Civil Procedure. AIA is committed to finding ways to reduce the problem of unnecessary costs and delays in civil litigation. We believe that rules reforms that can effectively address those problems are worthy of serious consideration and debate. We therefore appreciate the opportunity to provide you with our views, at this hearing.

We have previously commented on the proposed changes to the Federal Rules of Civil Procedure. In 1991, AIA appeared before the Advisory Committee on Civil Rules, in response to their call for comment on proposed changes to Rule 11. At that time, we urged the committee to preserve Rule 11 in its current form. Then, in February 1992, we again expressed our concerns about various proposed rules changes. At the same time, AIA also commended the Advisory Committee for seeking the

adoption of certain reforms which AIA believes will help to achieve the just, speedy and inexpensive determination of civil litigation.

My testimony, today, will focus on our concerns regarding Rule 11. We are also concerned that the Rule 26 disclosure proposal will create serious compliance problems for defendants, and that the proposed deposition limits under Rules 30 and 31 do not adequately address the discovery needs of multi-party cases which are normally more complex. However, the premature and unwise rewriting of Rule 11 causes us the greatest concern, as we believe that the current Rule provides a highly effective and valuable deterrent to frivolous and abusive litigation which causes delays in the system and costs to litigants.

SUMMARY OF PROPOSED RULE 11 REVISIONS WHICH CONCERN AIA

AIA's concerns regarding the proposed amendments to Rule 11 are focused in the areas of: (1) permissive, instead of the current mandatory issuance of sanctions for frivolous or abusive tactics; (2) allowance of *post-filing* investigation to attempt to support allegations and factual assertions, instead of the current requirement for a *pre-filing* inquiry; (3) 21-day "safe harbor" to withdraw a challenged pleading, with impunity; and (4) discretionary payment of monetary sanctions to the court or the opposing side, instead of the current authorization for an "appropriate sanction" which may include reasonable attorney's fees paid to the side which is caused to incur attorney's fees and expenses as a result of the violation.

SUPPORT FOR CURRENT RULE AND AIA'S CONCERNS REGARDING REVISIONS

The current Rule 11, as written in 1983, works, and is supported by the federal judiciary. In dissenting on the proposed changes to Rule 11, Justice Scalia found that there appears to be general agreement among federal judges that Rule 11, as written, works. He pointed out that the Federal Judicial Center's Rule 11 survey of federal district judges shows that 80% of federal district judges believe that Rule 11 has had an overall positive effect and should be retained in its present form. Further, 95% believed that the Rule had not impeded development of the law, and about 75% said that the benefits justify the expenditure of judicial time. (See Appendix A.) Although Justice Scalia did not object to two specific amendments,¹ his conclusion on the overall Rule 11 changes should be heeded: "[T]he overwhelming approval of the Rule by federal district judges who daily grapple with the problem of litigation is enough to persuade me that it should not be gutted as the proposed revision suggests."

AIA opposes a discretionary Rule 11. In our opinion, a discretionary Rule will substantially decrease the current Rule's role as a highly effective and valuable deterrent to frivolous and abusive tactics which cause delays in the system and costs to the litigants.

Rule 11 is the one rule that commands the full attention of the bar as a tool to deter litigation abuse. According to the American Judicature Society's (AJS) recent report surveying federal court lawyers on the use and impact of Rule 11: "It may well be that Rule 11 has become the 'generic' or 'all-purpose' sanction, the one that is thought of and referred to for all kinds of sanctionable activity." The proposed amendment for permissive sanctions should not be adopted because it essentially breaks the civil litigation system's most effective tool for policing lawyer and litigant abuse, and decreases the likelihood that judges will use that tool.

In our opinion, allowing *post-filing* investigation of factual allegations will also undermine the Rule's current role in deterring frivolous pleadings. More importantly, coupled with the "safe harbor" authorization to withdraw a challenged pleading, without penalty, the allowance of *post-filing* investigation will encourage abusive conduct, increasing the costs associated with civil litigation. We foresee that multiple skirmishes will result, delaying the overall progress of the lawsuit and increasing transaction costs.

A crucial element in the current Rule is the requirement for pleadings to be well-grounded in fact when filed. It should be noted that the AJS's Rule 11 study reveals that the current Rule is having a pervasive impact on lawyers' practice, particularly in prompting lawyers to engage in increased pre-filing review of factual matters. On the question of Rule 11's effect on their practice in general, the most frequent reaction was that 32.3 of plaintiff's lawyers and 39.6% of defense lawyers said they did

¹ Those two amendments are: proposed Rule 11(c) which would make law firms liable for an attorney's misconduct under the Rule, and proposed Rule 11(b) which would provide that Rule 11 sanctions be applied when claims in pleadings that at one time were not in violation of the Rule are pursued after it is evident that they lack support. AIA takes no position with respect to these amendments.

an *extra* pre-filing review of pleadings, motions or other documents prior to filing. AIA supports this "stop-and-think" approach to litigation.

In his dissent, Justice Scalia reminded the Supreme Court that the "safe harbor" provision contradicts the Court's recent decision in *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990). In that case, the Supreme Court upheld the trial court's jurisdiction to consider Rule 11 sanctions, despite the party's voluntary dismissal, and said: "Baseless filing puts the machinery of justice in motion, burdening courts and individuals alike with needless expense and delay. Even if the careless litigant quickly dismisses the action, the harm triggering Rule 11's concerns has already occurred. Therefore, a litigant who has violated Rule 11 merits sanctions even after a dismissal."

We believe that the practical consequences of the suggested allowance of *post-filing* investigation and the "safe harbor" to withdraw a challenged pleading, at no cost, will be to encourage some litigants to intentionally abuse the opportunity for a voluntary dismissal, and concurrently, to abuse the litigation process, with impunity. At the same time, they will force their opponents to incur substantial transaction costs without any chance of reimbursement.

AIA is also concerned that the amendments which give judges the discretion to order payment of monetary sanctions to the court or the opponent will create a system that is unfair, particularly to defendants and insurers required by contract to fund or pay defenses. The Committee notes point out that, ordinarily, a monetary sanction should be paid into court as a penalty. The notes also state that in unusual circumstances, such as where a pleading was presented to cause needless increase in litigation costs, some or all the monetary payment should be made to those injured by the violation. However, we believe that, in practice, courts will not award monetary sanctions to the victim of the violation, be it plaintiff or defendant. A party which has been made to incur transaction costs in defending frivolous claims and motions should be entitled to some reimbursement in each and every situation, not just the unusual.

CONCLUSION

In summary, current Rule 11 is a proven and strong tool for the bench to use, and litigants and bar to follow, in curbing or avoiding litigation abuse. We believe that the proposed amendments are premature and unwise, and should not be adopted at this time, if at all. The solution to any perceived problem with Rule 11 does not lie in amendments. It lies, instead, in the coordinated efforts of the judiciary to implement the Rule, as appropriate, and litigants as well as members of the bar to abide by the Rule's terms. Should Congress be inclined to adopt some of the amendments, we suggest that the concerns we have expressed be considered in developing a strong Rule which will help to achieve the fair, speedy and effective resolution of civil litigation. Furthermore, we suggest that if Rule 11 is being applied disproportionately to civil rights cases, Congress should develop a solution which responds to that issue without gutting the Rule's effectiveness in its application to a broad category of other cases.

CLOSING

Thank you for the opportunity to speak to the Subcommittee, today, about the proposed changes to Rule 11. AIA welcomes the opportunity to work further with the Subcommittee on this issue. I will be pleased to answer any questions you may have.

APPENDIX A

**Federal Judicial Center Final Report on Rule 11 to the Advisory
Committee on Civil Rules of the Judicial Conference
of the United States, May 1991**

**The Tables below are based on Tables in Section 2A of the FJC's Report
and provide further details on the judges' responses to the 1990
Questionnaire on Rule 11 -- 751 Judges were Surveyed**

Table 7

Has Rule 11 impeded development of the law?

	Percentage of 503 Judges Answering the Question
Yes	5.0%
No	95.0

Table 16

Do the benefits of Rule 11 outweigh the expenditure of judge time?

	Percentage of 452 Judges Answering the Question
Yes	71.9%
No	28.1

Table 17

What has been the overall effect of Rule 11 on litigation in the federal courts?

	Percentage of 472 Judges Answering the Question
Rule 11 has had a postive effect	80.9%
Rule 11 has had a negative effect	8.7
Rule 11 has had no effect	10.4

Table 18

What should be the future for Rule 11?

	Percentage of 526 Judges Answering the Question
Retain in its present form	80.4%
Return to its pre-1983 language	7.0
Amend in some other way	12.5

Mr. HUGHES. Ms. La Mothe, welcome.

STATEMENT OF LOUISE A. LA MOTHE, CHAIR, SECTION OF LITIGATION, AMERICAN BAR ASSOCIATION

Ms. LA MOTHE. Thank you, Mr. Chairman, members of the subcommittee. Good afternoon, I guess I should say at this point. It is my pleasure to appear before you today on behalf of the litigation section of the American Bar Association.

Let me emphasize that my appearance here today is not on behalf of the American Bar Association in general, which has not taken a specific position with respect to the matters I am about to discuss. However, the American Bar Association is on record as approving the intent of the Civil Justice Reform Act of 1990. And I believe that the expression of these views is consistent with that earlier policy.

Also, I believe, consistent with our present position, is the torts and insurance practice section of the ABA, the business law section, and young lawyers division. And also the position that I am about to espouse will be considered by the American Bar Association's board of governors at its upcoming meetings this coming weekend.

As litigating lawyers and as officers of the court we have a duty to make sure that the justice system works efficiently and fairly. My purpose in appearing before you today is to ask you to defer adoption of the proposed amendments to rule 26(a)(1) until December 31, 1995. We are choosing that date for reasons that are undoubtedly obvious to each of you, as that is the date by which the plans of local district courts throughout the country, under the Civil Justice Reform Act of 1990, are scheduled to be completed.

Now, in passing that act, we believe that Congress established a very viable framework which was intended to achieve much-needed reform, which we also recognize is needed. And that reform is to include discovery reform through the use of the experiments developed and implemented by the local 94 district courts.

The results of these diverse and innovative plans are to be analyzed and are to be used as a basis for the creation of a national discovery rule. So far, 34 district courts have implemented plans, and the remainder are scheduled to begin implementation by the end of this year.

We have had broad-based advisory groups which have been involved in the creation of those local plans. Lawyers have been involved in those advisory groups in a meaningful way. If the proposed amendments to rule 26(a)(1) were to be adopted now, it is going to effectively preempt the experiments which are going on in the local district courts, and we believe that valuable information that Congress intended to receive from those experiments could be lost.

The Civil Justice Reform Act was adopted in order to allow laboratories to exist around the country, to learn of unforeseen problems, and side effects that can often result from an instance in which discovery or other types of reform has been well meaning but untested.

So the district courts—learning through trial and error what is effective and what isn't—should be allowed to continue with their

experiments, unimpeded by this blanket rule which would be adopted if the changes to rule 26(a)(1) are put into place.

Now, it could be argued that because there is an opt-out feature which is included in the proposed changes, that the local courts can still devise their own plans, and therefore you do not need to defer adoption of rule 26(a)(1). However, we believe that the very existence of a national blanket rule is going to bias the current experimentation and may, in reality, forestall it completely, particularly in those districts that have not yet begun their own implementation. And it is as a result of our concern not to stifle that creativity that we suggest to you that adoption at this point would be unwise.

Meanwhile, the litigation section of the American Bar Association, along with a variety of other groups, has been working to shape the reform of the current rules to take into account the differences among different types of litigation. One of those efforts by way of example is a national symposium on civil justice improvements which is scheduled to occur this December. It is going to include other ABA entities, consumers, public interest groups, business and so forth, and we hope that Congress will also be involved in that effort.

We believe that Congress in any case should have the opportunity to review the recommendations from this symposium, as well as recommendations coming in from other sources before making the changes that are currently contained in these proposed amendments to rule 26.

So, in closing, I want to just say that reform is needed, confusion is not needed, and we urge Congress accordingly to allow the local 94 district courts to continue the experimentation under the Civil Justice Reform Act.

Thank you.

Mr. HUGHES. Thank you very much.

[The prepared statement of Ms. La Mothe follows:]

PREPARED STATEMENT OF LOUISE A. LA MOTHE, CHAIR, SECTION OF LITIGATION,
AMERICAN BAR ASSOCIATION

My name is Louise A. La Mothe. I am a member of the bar of the State of California, admitted in 1972. I am a partner in the law firm of Riordan & McKinzie, with offices in Los Angeles, Costa Mesa and Westlake Village, California. I appear today on behalf of the Section of Litigation of the American Bar Association. I presently serve as the Chair of the Section of Litigation.

My statement endeavors to reflect the consensus of the deliberations of the Council of the Section of Litigation of the American Bar Association. The views expressed here have not been specifically approved by the House of Delegates or the Board of Governors of the American Bar Association. However, the position adopted by the Litigation Section Council is fully consistent with the ABA policy endorsing the intent of the Civil Justice Reform Act of 1990, and to that extent does represent ABA policy.

The Litigation Section, with approximately 63,000 members, is the largest section of the American Bar Association. The ABA has 351,000 total membership. The focus and mission of the Litigation Section is to provide leadership and training to, and exchange of information among, trial lawyers and litigators. As attorneys, our fundamental goal is to serve our clients in the best way possible. As officers of the court, we also have a duty to make the justice system work efficiently and fairly.

This statement, and my appearance before the House Subcommittee on Intellectual Property and Judicial Administration, is in response to the invitation of the Honorable Jack Brooks, Chairman of the House Committee on the Judiciary. The Section of Litigation is grateful for the opportunity to present these views on whether Congress should permit the proposed disclosure changes to Rule 26 of the Federal Rules of Civil Procedure to go into effect or whether Congress should delay their

adoption. We urge that Congress defer the adoption of the proposed amendments to Rule 26(a)(1) until December 31, 1995.

I. THE PREMISE OF THE PROPOSED RULE IS CORRECT

Our statement here is limited to Rule 26(a)(1).

The Council of the Section of Litigation, comprised of litigating lawyers, supports the premise and the goals of the proposed amendment to achieve: (a) the voluntary exchange of basic information (particularly the names and addresses of persons having knowledge and the location of documents most relevant to the case) early in the litigation process; and (b) greater control over the discovery process which in its current form, when not properly managed by the litigants and courts, can often be inordinately expensive and protracted. The courts, the legal community, and the public all realize the need for a reduction in the delays currently inherent in the discovery process and welcome guidelines that will encourage an equitable, early exchange of information that make the assessment and management of a case simpler, shorter, and consequently, less expensive to the litigant and the taxpayer.

II. BACKGROUND OF THE SECTION OF LITIGATION'S VIEWS ON THE PROPOSED RULES

In February, 1992, the Section, as well as other groups, was invited to present its views on the then proposed amendments to the Federal Rules before the United States Judicial Conference Advisory Committee on the Civil Rules. At that time, the Section stated that, although we generally supported the concept of disclosure, we found problems with the wording of Rule 26, as then proposed. We urged the Advisory Committee to defer blanket changes in the discovery rules until results of the experimentation in local federal district courts around the country under the Civil Justice Reform Act of 1990 could be known.

After hearing from a variety of groups and individuals, the Advisory Committee on the Civil Rules subsequently reconsidered and redrafted some of the language to the present form of proposed Rule 26(a)(1). No hearings have been held by the Advisory Committee on the now revised language.

III. DEFERRING THE ADOPTION OF PROPOSED RULE 26(a)(1) IS MOST CONSISTENT WITH THE PURPOSES OF THE CIVIL JUSTICE REFORM ACT OF 1990

The Civil Justice Reform Act of 1990 ("CJRA") requires that every federal district court develop and implement local rules designed to attack the problem of delay and expense in civil litigation. The legislation provided for the involvement of advisory groups, comprised of attorneys and representatives of major categories of litigants. Thirty-eight districts already have reported, and many have experimental rules in place. The rest of the ninety-four districts will put their plans in place by the end of this year. The United States Judicial Conference is charged with the task of evaluating the results and reporting back to Congress by the end of 1995.

Recognizing the need for experimentation—the freedom to learn by trial and error—Congress created a system of district court "laboratories." This local approach is proving to be an effective method by which the district courts can develop their own unique plans to achieve civil justice reform goals. Most of these plans have provisions, with several variations, dealing with improvements in the discovery process. It would undermine the spirit of that legislation to interfere with the plans now in place, or soon to be implemented, before the empirical results of each court's experiences has been collected. Invaluable information regarding which approach in practice best satisfies the goal of streamlining the discovery process without causing unintended and undesired side effects is exactly what Congress intended to achieve from the CJRA. We should let litigants and the courts, through the CJRA, benefit from this unique opportunity to obtain real life experiences and then act accordingly.

We understand that pursuant to proposed Rule 26(a)(1), the proposed disclosure rules are subject to an exception "to the extent otherwise stipulated or directed by order or local rule." While this provision will permit courts to continue their own experimentation under what in effect is an "opt-out" procedure, we believe the proposed national rules will nevertheless bias this experimentation, and perhaps retard the degree to which local federal courts explore the range of different formulations of a possible disclosure obligation. By contrast, deferral of the disclosure rules in Rule 26(a)(1) until December, 1995, will permit local courts to experiment with the proposed version of the rules without mandating—where no local rules have been promulgated—a "default" to the current untested version of those rules.

The intent of Congress in its adoption of the CJRA can be best achieved through the unimpeded completion of the district courts' experimental plans and the analysis of the resulting experiences, scheduled for December, 1995.

IV. CONGRESS SHOULD CONSIDER DEFERRING THE ADOPTION DATE OF ANY AMENDMENT TO RULE 26(a)(1) UNTIL THE NATIONAL SYMPOSIUM ON CIVIL JUSTICE IMPROVEMENTS HAS CONVENED AND ISSUED SUGGESTED IMPROVEMENTS

For many months, the American Bar Association, with the active involvement of the Litigation Section, has been working with a broad spectrum of consumer, public interest, business and other groups to develop a set of consensus proposals in the areas of discovery improvements, case management techniques, devices to ensure the enhanced utilization of alternative dispute mechanisms and measures to achieve greater efficiencies in the trial process itself. With the assistance of academic reporters, we are now well along in the drafting process and our proposals will be presented at a National Symposium on Civil Justice Improvements in Washington in early December. We will be meeting with Congressional officials during the next several weeks to detail our efforts and invite their participation. We are reviewing various forms of disclosure along with a host of other approaches. In preparing our recommendations, we are paying close heed to the proposal so far set forth in the CJRA plans and the early reports on the effectiveness of these various approaches. We believe that the conclusions reached at the Symposium, which will be published early next year, will yield additional constructive recommendations for improvements in the discovery process and that an important change of the kind here proposed should await the results of that undertaking.

V. CONCLUSION

While the Section of Litigation continues to favor the voluntary exchange of basic information, we would also point out that the experimentation process now ongoing in the district courts seems likely to generate much needed further improvement to the currently proposed rules. While we believe it would be premature, for reasons expressed earlier, to reach final judgment now regarding necessary revisions to the proposed disclosure rules, we believe by way of example that further study ought to be required with respect to:

Means for permitting discovery to proceed in advance of, or instead of, mandatory disclosure, where delays built into the current disclosure rules are undesirable; and

Standards by which litigants may seek exception from the requirements of disclosure where, for example, the standards of relevance should be tempered by considerations of burdensomeness or other factors. See Fed. R. Evid. 403.

We also believe it would be prudent to await the recommendations of the upcoming National Symposium on Civil Justice Improvements. This focused look at discovery improvements, as well as other civil justice reforms, can only help to clarify this issue for all of us.

In short, the intent of Congress and its adoption of the CJRA can be achieved best through unimpeded completion of the district courts' experimental plans and the analysis of the resulting experience scheduled for December, 1995.

Mr. HUGHES. Mr. Frank, Ms. Pendell testified that a Federal Judicial Center study shows that 80 percent of the judiciary wants to see rule 11 retained in its present form.

Of the judges surveyed back in 1990, 71.9 percent indicate that the benefits of rule 11 outweigh judges' expenditure of time on those issues. Also, 80.9 percent believe that rule 11 had had a positive effect on litigation in the Federal courts.

These are the folks that have to live with this thing.

Mr. FRANK. Your Honor, with deference, they are not the folks that have to live with it. It is the bar that has to live with it. Every once in a while you do get a matter in the system in which there is a difference, almost a class difference, within the profession.

What I observed earlier is that as between cats and mice, it is more fun to be a cat than to be a mouse. The fact of the matter is that the bar is objecting strenuously to all sides of it. I am speaking for at least six former chairmen of the litigation section,

which is the main branch of the ABA for court purposes, for the American College of Trial Lawyers which made the basic suggestions I have espoused, and by no means all of which have been adopted, for the full board of governors of the American Trial Lawyers Association, and, I hasten to add, for numerous judges in addition.

The civil rights bar is particularly strenuous on this point because the matters have been particularly unfortunate in that area. Judge Schroeder of the ninth circuit, the third senior judge there, is one of the sponsors of the proposals I have presented. Judge McKay, the Chief Judge of the tenth circuit, is one of the sponsors of the proposals I have presented. Judge Sloviter, the Chief Judge of the third circuit, has espoused those proposals. Numerous other judges—you have the whole list attached to my statement—have strongly backed these proposals as well.

One figure that was used which simply shows you the enormity of the thing, is that the American Judicature Society study, which has been presented, showed that 82 percent of the lawyers polled had been involved in one form of rule 11 problem or another. And from my own standpoint is the standpoint of judicial administration. It is simply too much.

The thing has gotten out of all reason and out of all utility. The purpose, granted, was a good one. But the special element that I particularly stress is the seventh circuit bar study showing the great increase in incivility among lawyers. What happens now is that you have to go after the loser to say that he shouldn't have had the suit in the first place.

I stress the fact that the defense bar is—representatives are also very strenuously unhappy with the rule. We asked for much more radical revisions than we got. What this proposal does in its modest way is simply provide for a deterrent system.

That is my response, I hope not too lengthy, to your question.

Mr. HUGHES. You answered my question. Thank you.

Do you have any idea of what percentage of rule 11 motions are granted?

Mr. FRANK. We have the figures. The record shows some 3,000 cases, and I think that sanctions have been allowed in something—between 500 and 1,000 reported instances. These, by the way, are very concentrated in particular districts. Particular judges use the power much more than others. So that you get pockets. But that is the best I can do by way of answer.

It is the cost of arguing about it that is the misfortune. Also the malpractice factor, which was brought out.

Mr. HUGHES. Does that suggest that there are a lot of spurious matters that are brought before the courts, having that high a percentage?

Mr. FRANK. No, I think, Your Honor, that the proportion is sufficiently small that it does not. The real difficulty is in telling what is spurious and what is frivolous.

The problem, Mr. Chairman, is that it is easy to use the word "frivolous" as though it conveyed meaning, but it really doesn't. The most dramatic single instance or study is the study by the Federal Judicial Center that showed that on a sampling asking

judges whether a case was or wasn't frivolous, they divided exactly 50/50.

So that it becomes a matter of perspective, and frankly sometimes of irritability and so on. The safe harbor device will get rid of a good many of them if people want to get rid of them that way. The abuse has been dreadful.

You have also, especially from the civil rights bar, very unhappy stories of very severe abuse. The problem of *Brown v. The School Board* is an illustration of an idea that was innovative when it was filed. I was counsel with Thurgood Marshall in that matter. I suppose if we had lost we would have been in violation of rule 11. It was directly in contradiction of *Plessy v. Ferguson*. One man's innovation is going to look like another fellow's dumb idea.

Mr. HUGHES. Mr. Slater, in your written statement you say that the deposition process should not be relegated to a lesser standard of accuracy than other court proceedings.

Mr. SLATE. Yes.

Mr. HUGHES. If, as Judge Schwarzer has testified, only a small fraction of depositions are used in trials, why should we require a stenographer?

Mr. SLATE. Well, for the reasons that I have mentioned. First of all, the cost factor is very clear. The cost of using a stenographer is substantially less. It is less costly to the court system and it is less costly to the litigants.

Mr. HUGHES. But doesn't the rule change just permit the lawyers to make that decision?

Mr. SLATE. Certainly the Congress can do that, but our position is that Congress probably doesn't want to encourage a rule that encourages greater cost and which also encourages the use of limited vision technologies and noncomputer-based technology.

Although the present rule provides for, we think, generous opportunities for lawyers to make decisions, it doesn't seem to us that a rule should encourage a process that is more expensive, less accurate, and includes a delay factor in transcribing, enhancing opportunities for error.

And finally, the problem is, when depositions are taken and there is a lag time and you have multiple players in the process, the opportunities for error are substantial.

There is also the delay factor with respect to what happens to the credibility of the tape, the audio or videotape.

So for those three reasons, the cost factor, the accuracy factor, and the noncomputer-driven technology factor, we maintain that Congress and the courts should not be encouraging a rule that inculcates such problems as the norm.

Mr. HUGHES. I don't totally understand that, because as I understand, the rule will permit the lawyers to make that decision. If I am involved in a deposition and I am not happy with the manner in which a person is to be deposed, I would opt, I would think, to either discuss it with counsel or have a different form of transcription taken.

Mr. SLATE. Well, clearly you have that option under the present rule.

Mr. HUGHES. Won't you have it under this rule?

Mr. SLATE. You will have it under the proposed rule, clearly you would, but the rule in its context would seem to encourage that. And we say any rule that encourages a methodology that is going to be less accurate, more costly, and employs a limited vision technology—audio and video are not computer driven—really places both the courts and the Congress in the position of encouraging a process that in most all respects is already passe.

Mr. HUGHES. I think your point is probably well taken. I think that technology basically has outrun the promulgation of the rules to a great extent.

Mr. SLATE. Yes, it has, indeed.

Mr. HUGHES. I think Arizona perhaps points the way, the direction that I would expect—

Mr. SLATE. That is true, Mr. Chairman, not only in Federal courts, but even more so in State courts. State courts in many respects are taking the lead here, in computer-integrated courtrooms involving a stenographer, and for the reasons I mentioned earlier, those other benefits to this technology, this real-time reporting, which enables the hearing impaired and the visually impaired, be they jurors or litigants or judges, to be fully involved, it is clearly the way the technology is going.

Mr. HUGHES. So you are content with the present rule?

Mr. SLATE. Absolutely, yes.

Mr. HUGHES. You wouldn't rewrite it in any way?

Mr. SLATE. For the accuracy, cost, and computer-driven arguments, the present rule is just fine.

Mr. HUGHES. You would not rewrite it in any way?

Mr. SLATE. I would not, no.

Mr. HUGHES. Ms. Pendell, in your testimony you voice concern that revised rule 11 would allow post-filing investigation of a claim. That is one of your contentions. Isn't it necessary for the lawyer to conduct extensive post-filing investigations under the present rule?

Ms. PENDELL. Oh, yes. This current rule 11 is no substitute for that. But it requires that before a claim is filed that there is some reason to believe that it is based in fact or in law.

Could I respond very quickly to your earlier question to Attorney Frank? The current rule 11 does not use the word "frivolous." If I could just read to you what is sanctionable under the current rule, because it also goes to the other issue of whether or not good decisions that have been made in the past would in fact not have occurred because they would have been subject to rule 11 sanctions, because they weren't based on precedent.

The current rule 11 requires that "to the best of the signer's knowledge, information and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law."

So as you can see, it doesn't require the definition of frivolous, and it also allows for the circumstances that Attorney Frank referred to.

Mr. HUGHES. Thank you.

Ms. La Mothe, your statement emphasizes a need for experimentation in the area of disclosure, and I agree with that. Didn't the

Rules Committee respond to that concern by allowing the parties or the district judge to opt out of the disclosure system?

Ms. LA MOTHE. Yes, Mr. Chairman, the proposed rule does allow for an opt-out, and I think that our response to that is that while an opt-out procedure is certainly better than nothing, that it puts the onus, we believe, in the wrong place. And we are particularly concerned about biasing the experimentation which is currently underway.

We might choose, for example, when the dust has settled, to have a different type of mandatory disclosure rule than the one that is presently before you.

There is a lot of opportunity for a lot of experimentation now. And our feeling is that rather than try to do this on a piecemeal basis at the local level, that it makes more sense simply to stand back for the length of time necessary to see what the local courts decide under the Civil Justice Reform Act.

Mr. HUGHES. Mr. Frank, I wonder if you can respond to that. Wasn't the purpose to try to set up laboratories with experimentation? Isn't there some substance to what Ms. La Mothe suggests?

Mr. FRANK. Of course there is, Mr. Chairman, but I feel that in view of the fact that the present rule—the proposed rule, the 26 that is before you, expressly provides, except as local rules may otherwise provide, that it will not overlay the experimentation, it will not preclude the experimentation that exists. It will simply fill in in other places. And I think it will become a useful guideline.

This is such modest disclosure here. First, you have to have pleaded with particularity, that is a rule 9 limitation. You haven't had five of those in your life, probably, in your own practice years. Then you have to divulge simply your witnesses and answer obvious interrogatories which you had to know about in order to have pleaded it in the first place, if you pleaded with particularity.

So I think it is sufficiently light a touch that it will prove useful for other districts, and because of the exception for local rules, I don't think it interferes at all with these. It just makes sure that everybody is going to be doing some experimenting.

Is it going to work? I don't know. Do we need to try something? Yes, we should. Do we want to review it in several years, 2, 3, 4, whatever the number is? Yes, it will be imperative that you do so, but you might as well review it for the whole country, and this ensures there will be going something going on somewhere.

Mr. HUGHES. Thank you. I want to thank you for addressing me as "Your Honor" three times. I don't get that back home, particularly after I voted for the economic package 2 weeks ago.

Mr. FRANK. Did I make you Your Honor? It couldn't have happened to a nicer fellow.

Mr. HUGHES. You are very kind.

The gentleman from North Carolina.

Mr. COBLE. Thank you, Mr. Chairman.

Good to have you all with us, this afternoon, as you say, Ms. La Mothe.

Mr. Slate, I thank you for having elevated me from the 19th to the 21st century. I am probably more comfortable in the 21st, however.

Let me ask you a question, Mr. Slate, that has not been touched upon, that I think is vital. If the proposed change to rule 30(b) were to occur, what effect would it have on court reporters? I am speaking professionally, means of livelihood.

Mr. SLATE. Well, of course, that is highly speculative. The numbers are that there are some 40,000 to 50,000 court reporters in the country; substantial numbers. And at their own expense they have retooled themselves to become computer literate and to use computer-aided transcription and to be a part of computer-aided courtrooms.

And so I think the court reporters, contrary to some other professions, have prepared themselves for the future, and they are taking the lead.

There is clearly room for the view, however, that if a rule which we think is ill-advised catches fire, it could clearly impact on the employment for these people.

I would really be rolling the dice to speculate to what degree it might. On the one hand, I think it would be unfortunate for a cadre of court professionals, whose core function is to provide an accurate record and enhance the integrity of the process, to start being out of work.

I would tell you parenthetically that this has happened in other States, on occasion, where another technology came into the court, and we are not talking about depositions. But in one instance where that occurred and audio technology was encouraged, and court reporters vanished, that system went to the dogs and is doing everything it can today to return to the use of certified court reporters.

So could it be an employment problem? Yes, it clearly has that potential. But as quickly as I say that, I also note that court reporters are really leading court systems to the future in computer-aided technology.

Mr. COBLE. And I think you may have touched on this, Mr. Slate, but as to reducing the cost of litigation, assuming this proposed change is adopted.

Mr. SLATE. Yes. Two points, and thank you for the opportunity to address that very point. Our studies showed that regardless of whether a transcript of a deposition was prepared and used, or, if a transcript was not prepared, and even in the rare instance where a tape was used, we found that the costs associated with employing a court reporter were less than any other methodology.

Another truly important factor that hasn't been touched upon here, however, is the realization that the use of an accurate transcribed deposition is a fundamental basis upon which cases get settled. And if that document is not available—and we have been told by many people how much time is consumed in reviewing tapes—then many frivolous cases will unnecessarily go to trial. I was told by a State appellate judge that seeing a stack of tapes was an absolute disincentive to review the trial record.

So if the process is diminished by the availability of a deposition, then that will clearly have an impact on the cost of litigation in terms of which cases go to trial when they shouldn't.

Mr. COBLE. Thank you, sir.

Ms. La Mothe, correct me if I misinterpret what you said. As I read your comments, you are neither endorsing nor rejecting the proposed changes, but rather would wait for the respective districts to respond in accordance with similar changes performed back in 1990, and then once all this information has been assembled, then go from there; is that correct?

Ms. LA MOTHE. Absolutely. Absolutely.

Mr. COBLE. Mr. Frank, I am going to plow this field again. I tried this with the preceding panel, and was received warmly. Let me try it on you.

Is there not a risk that an attorney may overly generously reveal his strategy and his theories in a particular case if he is required to fully and automatically disclose?

Mr. FRANK. If it were really full disclosure, there would be conceivably such a possibility. But what we are doing, as I read the rule, is this. We now have rule 33 that provides for interrogatories. That is going to be happily limited by the number of interrogatories, but it provides for them.

We have rule 34 providing for discovery of documents. We also are required to enumerate witnesses, and we are also required to provide the opinions of experts.

What rule 26 does, as I read it, is take those processes, all of which are required in the course of the litigation anyway, and move them up to the beginning so you know what you are looking at, and only in a limited number of cases, and only insofar as it is squarely relevant.

So this is not a matter of any added revelation. It is simply and purely a matter of timing. Are we going to get on with this blasted lawsuit and see what it is all about and encourage people to take a look at it and then go on and settle it, or are we going to wait 3 or 4 months down the line and then get the very same information?

So you are making a timing judgment when you pass on rule 26. But you are not making a judgment as to what is to be disclosed, because this is only a modest part of what will have to be disclosed.

Mr. COBLE. The gentleman from California, Mr. Moorhead, previously referred to a survey of attorneys in Maricopa, and I believe you stated you are not familiar with that?

Mr. FRANK. Maricopa County is my home. I was chairman of the State procedure committee for 30 years. I know what is going on there. There has been no formal survey. We do have a much more elaborate disclosure.

Had I been surveyed, I would have responded negatively about it. It is sufficiently different from this. But you have got to be real careful—

Mr. COBLE. You are referring to the survey that was referred to?

Mr. FRANK. That is correct.

Mr. COBLE. Mr. Frank in his statement, Ms. Pendell, indicated the worst feature of rule 11 is that it is a fee-shifting device so that the prevailing lawyer can get his fee out of the losing lawyer's side. I am taking neither side on this, but I would be glad to hear you respond to that.

Ms. PENDELL. I can't quote the statistics, but if you look at the Federal Judicial Center study, it will give you a great deal of infor-

mation about the size of the monetary sanctions. And you will see that they are on balance quite modest, and that substantial monetary sanctions have been rather infrequent.

That suggests to me that to the extent that there is a monetary sanction, it is not fully compensating the other side. And, in fact, the money may be paid to the lawyer but it is really the client who would benefit from that, particularly if you are talking about a client whose insurance company has not paid the lawyer, but who, rather, has paid the lawyer out of pocket.

Mr. COBLE. I thank the panel again.

I thank you, Mr. Chairman.

Mr. HUGHES. The gentleman from California.

Mr. EDWARDS. Mr. Chairman, I am getting more of an education than I had expected, and I am delighted. It is really very helpful.

I think I just have one question. Ms. La Mothe, is the ABA going to make a recommendation on these rules?

Ms. LA MOTHE. Well, I would say, Mr. Edwards, that with respect to rule 26(a)(1), there will be a proposal recommended to the ABA board of governors, which will be meeting this coming week-end. I understand you are going to be holding the record open. Should they vote to support deferral, which is what will be proposed to them, then obviously we would request also that they make mention of that and add it into your record.

Also, I am aware that the young lawyers division is presenting, for the consideration of the ABA House of Delegates at the annual meeting in New York in August, a recommendation that would oppose rule 26(a)(1), and allow the remainder of the rules to go into effect.

Mr. EDWARDS. It is your personal recommendation that insofar as rule 26, that we don't at this time endorse—approve it?

Ms. LA MOTHE. Right, don't change it. That would be the position of the litigation section. Defer the adoption of any changes to rule 26 until there has been an opportunity to see what happens in the local district courts under the rule.

Mr. EDWARDS. Thank you very much.

Thank you, Mr. Chairman.

Mr. HUGHES. The gentleman from New Mexico.

Mr. SCHIFF. Thank you, Mr. Chairman. I just have a couple of questions.

Following up on that, Ms. La Mothe, I understand your proposal of a deferral to—I think you said December 31, 1995—to be in conjunction with the date that the local plans are due from district courts.

What I don't know is, what do you envision happens then? Is this just a matter of equal timing, or do you foresee that perhaps based on the local plans we won't need changes in rule 26(a)?

In other words, what is the point of the deferral?

Ms. LA MOTHE. Thank you, Mr. Schiff. I appreciate that question. And I think that no doubt you detect that there is this timing inconsistency, and I think that the concern of our council was simply that there not be a nationwide rule put into effect now, that we allow that implementation to occur.

No doubt when those local plans come in and we actually across the country begin to see what the results have been, we may very

well say, well, maybe 6 months more will be necessary to really cogitate and come up with something.

I personally would not be at all surprised to see some sort of a rule with respect to disclosure at that time. But it might look nothing like the present rule, which I do believe has a very vague standard, and which I think is not all that easy to implement. It is going to promote collateral litigation, it is going to create a proliferation of motion practice, and I think it far better to let those local courts experiment, and then after we have had a chance to cogitate, to go back in and make a nationwide rule.

Mr. SCHIFF. You would at least foresee the possibility, then, that at that time the rule may be different than what is before us today?

Ms. LA MOTHE. Absolutely.

Mr. SCHIFF. Mr. Frank, virtually all of my practice, when I was practicing in courtrooms, was in the State court system in New Mexico. Only on very rare occasions did I happen to practice in Federal courts. So with that in mind, I wonder if you could go back over rule 11.

You have resoundingly criticized present rule 11. You have made that very clear, but in what, to me, is somewhat conclusionary language.

Could you perhaps with just a little more detail, with examples, demonstrate exactly how current rule 11 creates the premises that you have described?

Mr. FRANK. Yes. I am grateful for the chance. I have laid this out in several-page length in the formal statement you have, which the 5-minute rule of necessity requires us to abridge.

But the problems which have arisen under rule 11, one of which has technically concerned me, because I have spent all of my years with this and related committees, just on judicial administration, is the vast increase in the number of controversies that are pushed into the courts. What was anticipated to be a rare thing has now in all the literature gotten to be thousands of matters.

So that we have created a prodigious body of satellite litigation. And the consequence is that the burdens on an overburdened court system throughout the country and the Federal courts—as you know full well, many of them can't take civil cases at all. Everything you add you have to think about. Is it worth adding? And this is proving very time consuming, very burdensome, as a simple matter of administration.

Mr. SCHIFF. Pardon the interruption, but what specifically is increasing? More motions to dismiss under rule 11?

Mr. FRANK. No, I am sorry, not that there are motions to dismiss. What is happening is that a case is filed, somebody—an answer is filed, either side, there are—about 75 percent are against plaintiffs, 25 percent are against defendants. If you don't abandon this case, if you don't give up on this, I am going to go after you for rule 11 sanction. That gets in at the correspondence stage. In short, the lawyers try threatening each other.

Personally, they are not arguing the case any more. They are saying, "You are a bad lawyer; you shouldn't have done this." At that point they have to invoke, as one of you brought out, their malpractice carrier. They have to inform them there is a possible

sanction there. So it has a general effect of forcing up insurance premiums and insurance relations.

Then comes the stage finally—we will jump to the end. The case is over. Motion is granted or it is not. The case is disposed of. Then the controversy arises, was this a rule 11 case, should I get sanctioned, should I pay my attorney's fees for having to be in this case? That is the area which is running into a very large volume, quite literally thousands, as the figures show. And this becomes in itself mountainous.

There is a further independent deleterious value factor, and I will mention one other and be done, because you are short for time. The business which is vital to your practice and mine—and I have a lot of State work, of course, too—the lawyers have got to get along. They have got to remove themselves from their cases. They can't be after each other. And the lawyer who is after the other lawyer is usually something of a menace to the practice and to officials and to the good operation of the bar.

What the rule is doing is compelling lawyers to go after each other. If you are entitled to that claim for counsel fees, then you have got to say to the other guy, "Now, you are so wrong that you have got to pay the counsel fees here." So we get the phenomenon I described. First you try the case and then you try the lawyer.

This contributes materially to a serious deterioration of relations at the bar, which in turn creates friction and makes it harder to settle cases and generally operate. That is quite apart from the abuse problems. Those are just the routine rule 11 problems.

Mr. SCHIFF. So the increase in litigation you are talking about is an increased number of claims for sanctions against attorneys?

Mr. FRANK. That is right.

Mr. SCHIFF. I will ask you to respond in just a second since you were testifying on the opposite end, Ms. La Mothe. But staying with you for just a moment, Mr. Frank, have there been so many of these sanctions granted that there is an encouragement to go file them? If most of them are lost, it seems to me that would dissuade lawyers.

Mr. FRANK. In a world in which people sue the doctors if they don't get well fast enough and so on, we have—I don't know about your State, but probably there, too—we are getting an immense increase in the number of legal malpractice claims. And if the lawyer does not claim against the other lawyer to get some money to apply to the fees, then he may be guilty of malpractice to his own client.

Mr. SCHIFF. For not having claimed?

Mr. FRANK. To not have made the claim. So we have built in a system which creates a much greater incentive to add to that kind of friction.

Mr. SCHIFF. Could you briefly explain how the proposed change in rule 11 will solve that problem as you see it?

Mr. FRANK. We sponsored for much of the bar and many judges more radical changes. These are very modest.

What this does, Justice O'Connor, in her opinion in the *Cooter* case, which I believe the chairman discussed expressly earlier in one of his questions, stressed that the object of the rule is deterrence; it is not compensation. It is a fact that the courts are being

abused when somebody files a worthless case and the court's time is being taken.

So the rule, as amended, provides that there can be sanctions but the sanctions shall be paid into the court as a penalty as an equivalent to a contempt so that it will deter the conduct, but not put a premium on quarreling as between attorneys. That is change number one.

Change number two, is that there is a system so that people can withdraw from what proves to be an improvident position if they wish to do so in very rapid order.

And the third change, which was particularly sponsored by the American College of Trial Lawyers, which are overwhelmingly defendants, is the change from "shall" to "may," so that judges will have more discretion in this field and can make value judgments more easily and decide, "Well, does this really warrant it or doesn't it?"

So the three critical changes made in the rule are: (a) the granting of additional discretion to the judges; (b) the deterrence feature of Justice O'Connor's opinion by emphasizing that in most but not all cases the payment should be into the public Treasury for abusing the public service of litigation; and (c) that there should be an opportunity to retreat from error in very short order, before the blow falls.

Mr. SCHIFF. Ms. Pendell, it is my understanding earlier you testified in favor of rule 11 in its current form. You have heard my questions to Mr. Frank. I would like to give you the opportunity to respond in any way you wish to.

Ms. PENDELL. I will go back to the Federal Judicial Center survey and say that 60 percent of the judges said that few or none of the requests for rule 11 sanctions have themselves been groundless. So if there is a spate of rule 11 motions, it perhaps reflects on another problem in the courts.

I think no rule is without its problems. And every rule has to go to the greater good. There may be examples, anecdotes, that could be presented to this committee, which would cause the committee to feel that in that particular instance a rule 11 motion wasn't justified or was inappropriate or had an unfortunate consequence. But it is our belief that it does go to the greater good.

I think that the American Judicature Society survey and the Federal Judicial Center survey show that that is the case.

Mr. SCHIFF. Mr. Chairman, thank you. I yield back.

I thank the witnesses.

Mr. HUGHES. I thank you.

The rule for disclosure, 26, refers to matters pleaded with particularity. The standard has been criticized as vague and open to dispute. I questioned the judge's panel about what is core information? What kind of guidance do you see the courts providing to ensure that, frankly, lawyers are not penalized for not up front disclosing information that should have been disclosed. In effect, some judge may decide that there was core information which was not disclosed which a lawyer has read as not core information?

Mr. FRANK. Is that question directed to Ms. La Mothe, to me—

Mr. HUGHES. Anyone that wants to address it.

Ms. LA MOTHE. I will take a crack at it, Mr. Chairman. Thank you.

It is the position of the litigation section that the standard is unduly vague. It is one of the things that bothers us about it. At the time that we were asked for our comments to the advisory committee, and we made them back in February 1992, there was somewhat different language in the proposed change to rule 26(a)(1), which was "information likely to bear significantly on any claim or defense."

Now, after the public hearings have occurred, the present version of the proposed change is "discoverable information relevant to disputed facts alleged with particularity in the pleadings"—particularly troublesome, since we have notice pleading. One wonders exactly what it is that is core information, exactly as your question points out.

And also, again, of course, different from the present rule, and the standard for discovery, which is "information relevant to the subject matter or likely to lead to the discovery of admissible evidence."

So we detect a lot of problem here, and again, I think that there will be a need for motion practice with respect to what that means.

Mr. HUGHES. Mr. Frank, what would you say about that?

Mr. FRANK. Your Honor, briefly, this illustrates the fact that the system worked. The original draft was way too broad. There was criticism, very good criticism, from the litigation section. The draft they have reflects what we have in Maricopa County, and it is—you will pardon the expression—hell to live with.

What they did, then, for this experimental purpose, was cut it down to the particularity which is taken from rule 9 and which describes how you plead fraud, which must be pleaded with particularity.

Mr. HUGHES. But that is a factual issue?

Mr. FRANK. Take care actual issues. It is highly traditional, clearly understood. It is a narrow area. I think that the number of cases in which anybody will plead with particularity, because we use notice pleading, is so small that I think this really gets to be pretty close to the sound and fury over nothing.

Mr. HUGHES. Well—

Mr. FRANK. Could I make one other comment, please?

Mr. HUGHES. What is pleaded with particularity to one may not be pleaded with particularity to another. That language would be the genesis, it seems to me, of a large motion practice, unless there are some additional guidelines. If there were to be additional guidelines, what would you see as additional guidelines for practitioners that do not want to run afoul of the law?

I mean, most of the lawyers, I think, try to comply with the rules.

But lawyers that want to comply with the rules are asking, I think, a very good question. What does it mean? How do I stay within the confines of the rule? I grant you that part of it is the uncertainty of this change. Everybody likes the status quo.

Frankly, I can see why it is very important for us to move that process, the discovery process, if we can identify what is core, up at the beginning instead of waiting to see if a practitioner asks the

right question. A litigant can give him the information he is entitled to earlier in the process, because sometimes it takes us 2 years to get to the nub of a case that should have been resolved a year and a half ago. If the lawyer and the judge had focused in on it in the early stages of the trial instead of in the last stages of the trial, it probably would make the litigation simpler.

I understand the rationale for it, but I think that there is some legitimate concern over what we mean when we say "core information," and what we mean by "pleaded with particularity."

Ms. LA MOTHE. I think the comment is very well taken, and I think part of the difficulty perhaps lies in the dissimilarity of the various kinds of litigation brought in the Federal courts.

It might be very simple to say in connection with a certain type of case what is core information and could very easily be fleshed out. But one doesn't have to sit and think too long before one can come up with all sorts of difficulties in connection with more complex litigation. And that proliferation is exactly what has been bothering our section.

Mr. HUGHES. I must say that in my own experience over the years, I have seen so much game playing with the discovery process, and it does drive up costs. It does drag out these cases, and it does deny justice to a lot of individuals. So I am sympathetic to the effort to try to get to the meat of the case.

I have seen situations where a judge doesn't have the foggiest notion of what a case is all about, after 3 years, until he gets that filing and gets ready to move it to trial.

Mr. FRANK. Mr. Chairman, may I have one last thought before you leave?

One topic we have not adequately dealt with, and it has been of interest to you and Mr.—if I have his name correctly, Mr. Schiff especially, and that is Justice White's suggestion about the need for amendments to the Rules Enabling Act. May I touch on that very briefly? It is covered in my statement.

Mr. HUGHES. Sure.

Mr. FRANK. My deep hope would be that you, one of you, two of you, would introduce a bill to open up the Rules Enabling Act. You can't deal with that effectively, obviously, in this proceeding.

Now, all you are deciding is to let these rules go or not. But the Rules Enabling Act has been around for a long time and it deserves another look. Maybe Justice White was right. Maybe the Supreme Court should be dropped out. Maybe it has a useful function. If you could put in a bill and some Justice would come over here, some representative of the court, to speak to you in detail and get to the qualifications, it would be helpful, and there are some other aspects of the Rules Enabling Act that very much warrant consideration by you.

We wouldn't be having the problem we have today if the committees were of somewhat different constitution, for example. And I express the deepest hope that you perhaps, or perhaps a majority, minority, whatever leadership, would put in a bill which would open up this subject and have hearings on whether we are on the right track at all and how we should change the basics, if we should.

Thank you.

Mr. HUGHES. That is a very good suggestion, constructive suggestion. We will certainly consider that. Thank you, Mr. Frank.

Well, you have been very, very helpful as a panel to us, and I realize we have taken an awful lot of time, but these are very important issues. We appreciate that some of you came from such long distances to be with us and, we appreciate your contributions today. Thank you very much.

Mr. HUGHES. Our third and final panel consists of James D. Toll, partner in the Atlantic City, NJ, office of Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross. Mr. Toll is a member of the Defense Research Institute and is vice president for the southern region of the New Jersey Defense Association. He has been in private practice for about 13 years specializing in civil litigation, primarily in the areas of product liability, construction litigation and premises liability.

Also on this panel is F. Thomas Dunlap, vice president and general counsel, for the Intel Corp., a constituent of our distinguished colleague, Don Edwards. He joined Intel in 1974 as product engineer, became administrator of technology exchange contracts in 1977, and moved to the legal department in June 1980.

Also on this panel is Alfred W. Cortese, Jr., partner in the law firm of Kirkland & Ellis of Washington, DC. Mr. Cortese has litigated tort and product liability cases before courts and administrative agencies throughout the country. His area of expertise includes mass torts and complex litigation and Federal and State civil justice policy and court administration.

Also joining this panel is John J. Higgins, senior vice president and general counsel, Hughes Aircraft Co., and its parent organization, General Motors Hughes Electronic. Prior to joining Hughes, Mr. Higgins was an assistant general counsel for General Motors. He joined General Motors' legal staff in 1959. Mr. Higgins has responsibility for all legal matters involving Hughes Aircraft, and is principal legal adviser to the board of directors.

Our final panelist is George S. Frazza, vice president and general counsel, Johnson & Johnson. Prior to joining J&J in 1966, Mr. Frazza was an attorney with Royall, Koegel & Rogers law firm. He is chairman of the Tort Reform Committee of the Pharmaceutical Manufacturing Association, and a member of the Association of Corporate Counsel of New Jersey.

Welcome.

Mr. EDWARDS. Mr. Chairman.

Mr. HUGHES. The gentleman from California.

Mr. EDWARDS. Thank you.

Mr. Chairman, thank you for yielding to me for a moment. I welcome all of the panelists but I especially am pleased to have here as one of our witnesses Mr. Thomas Dunlap of Intel. Intel is something that all America should be very proud of. We certainly are in California and in Silicon Valley. It is on the cutting edge of semiconductors and indeed is the largest manufacturer in the world of semiconductors.

Mr. Dunlap was a great leader to us in 1984 when out of this subcommittee came the Chip Protection Act, which in effect allowed copyrighting the patterns on semiconductor chips, which has

been a big boon to this very important industry in the United States.

Thank you, Mr. Chairman.

Mr. HUGHES. I thank the gentleman for those remarks.

Mr. SCHIFF. Mr. Chairman, or Your Honor, as is appropriate—

Mr. HUGHES. Your Honor is OK today.

Mr. SCHIFF. A good deal of that production of Intel occurs in New Mexico, not quite in my district, but not too far away.

Mr. HUGHES. Not enough occurs in New Jersey, but we are working on that.

I thank the gentlemen for those introductory remarks.

Jim Toll is also a constituent of mine, a very prominent lawyer. And I think you are joined today by Jim Ferguson?

Mr. TOLL. That is correct.

Mr. HUGHES. Would he like to join us?

We are delighted to have each of you today. You each bring a great deal of expertise to the witness table. We appreciate that. Many came from long distances, and we also appreciate that.

We have your statements, which we have all read, and we need to get right to questions. So we would like you to summarize as best you can, but you may proceed as you see fit.

Without objection, each of your statements will be made part of the record in full.

Jim Toll, welcome.

STATEMENT OF JAMES D. TOLL, ATTORNEY, SILLS, CUMMIS, ZUCKERMAN, RADIN, TISCHMAN, EPSTEIN & GROSS, P.C., ATLANTIC CITY, NJ, ON BEHALF OF THE NEW JERSEY DEFENSE ASSOCIATION

Mr. TOLL. Thank very much, Mr. Chairman and members of the committee.

I am here today as a trial lawyer practicing in New Jersey and representing the New Jersey Defense Association, which I am a member of, as well as the Defense Research Institute, which is the national organization of which NJDA is a member.

I am going to limit my remarks and hopefully make them as brief as possible. I recognize that it is getting late in the hour, and we have already had testimony from quite a number of witnesses. My remarks are tailored specifically to the ethical dilemmas that I see as a trial lawyer if the proposed rule 26(a)(1) is in fact enacted.

There has been much discussion already concerning Maricopa County, and with respect to surveys that may have taken place in that particular county as far as the disclosure provisions are concerned.

I have at length quoted from Mr. Bruno's article that appeared in the Maricopa Lawyer. My remarks with respect to that particular article have to deal with the ethical dilemmas that he saw. And his comments were based upon a proposal that was in effect in Arizona which, in his words, was remarkably similar to the proposed rule 26(a)(1).

If I could just be permitted to quote from that article, I think it accurately, succinctly sets forth what my position is regarding the ethical dilemmas. He indicates, "I cannot reconcile the adversary

system, the competitive marshaling of evidence and the zealous representation of my client with the requirements of our disclosure rule. The requirements of the disclosure militate against good lawyering. Clients will be reluctant to hire a lawyer who has represented their business before, lest the lawyer knows too much that he is forced to disclose to the other side."

That in a nutshell is the problem we see with respect to the proposed enactment. You are dealing here with attorney-client privilege. You are dealing with a situation which has an attorney representing defendants in civil litigation. If I am given a file, and I review the file, and I then meet with my client, under the proposed amendment, I have to be very careful with respect to what is elicited from my client, because I have an affirmative obligation to disclose relevant material.

And it may very well be a situation, as Mr. Bruno sets forth in his article, that my client and I are in conflict, my client, on the one hand, indicating perhaps this is information that is not relevant, you don't need it, and I on the other saying, recognizing my affirmative, ethical obligations, no, this is information that I have to disclose.

Mr. Bruno raises the point, what then happens? Is it a situation where the client suggests perhaps I need another attorney, or do I as the attorney have to withdraw from the case? That is a very critical and problematic area that I see with respect to the proposed amendment.

The other deals with attorney work product. That has already been discussed before by other panelists. The way the rule is presently drafted, there is tremendous ambiguity and vagueness with respect to what is relevant. I have to make a determination as a lawyer, is the information that I am going to impart to my adversary, is that relevant information?

That is my thought process. Those are my mental impressions. Perhaps I have one theory of the case that my adversary does not share. If I impart information to him that he didn't even think about, I have imparted a strategy to him. I have in essence done the work for my adversary at the expense of my client.

Under that type of scenario, which I think is going to happen if the rule is adopted, it creates a tremendous, tremendous problem for trial lawyers. The situation can exist where we have to disclose information on one hand, yet have a duty to zealously represent the interests of our clients.

Those are very, very serious ethical dilemmas that Mr. Bruno addresses in his article and I see as being extremely, extremely problematic.

I would just indicate, briefly, in closing, we have an adversary system in place right now, a system where a plaintiff when filing the lawsuit will give requests for information through document requests and the like. A defense attorney will have the opportunity to review the request, have an opportunity to review his file and confer with his client, and then make an intelligent decision as to which information is going to be disclosed. That is the adversarial nature of the system.

If the rule is adopted, we do away with that, and I submit that is not what we want to do. We don't want to be in a situation

where we are leaving to the courts that are already overburdened the decision as to what is going to be relevant versus what isn't going to be relevant. Rather, the system that is in place, which places the onus on the parties, on the litigants, the lawyers representing those parties, to make the determination and provide information in response to document requests, is the way the system should operate.

And I would submit and urge the committee that with respect to 26(a)(1), it be rejected.

Thank you.

Mr. HUGHES. Thank you, Mr. Toll.

[The prepared statement of Mr. Toll follows:]

PREPARED STATEMENT OF JAMES D. TOLL, ATTORNEY, SILLS, CUMMIS, ZUCKERMAN, RADIN, TISCHMAN, EPSTEIN & GROSS, P.C., ATLANTIC CITY, NJ, ON BEHALF OF THE NEW JERSEY DEFENSE ASSOCIATION

Good morning Mr. Chairman and members of the Committee, I am James D. Toll of the Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross law firm with offices in Newark, Atlantic City, New Jersey, New York and Washington, D.C. I am representing the New Jersey Defense Association (N.J.D.A.) which is a statewide organization of civil defense attorneys and insurance company personnel. While I am here representing the N.J.D.A., my remarks have been prepared with input from and consultation with the Lawyers for Civil Justice and the Defense Research Institute (DRI) which is a national defense association of which the N.J.D.A. is a member. I appreciate this opportunity to testify regarding some very serious problems for my clients that I think would result from implementation of the proposed changes to Rule 26 requiring early automatic disclosure of information "relevant to the disputed facts alleged with particularity in the pleadings." I respectfully disagree with those who contend that opposition to this proposal is generated primarily by attorneys, motivated by their own selfish economic interests. I think the serious ethical problems created by this proposal will affect attorneys only in relation to their representation of their clients. As a practical matter, I agree with those persons in the business community who contend these changes will probably increase litigation expense and delay rather than reduce them.

INTRODUCTION

I am very concerned about the effect the proposed changes to Rule 26 will have on the adversary system which has been the hallmark of our civil litigation process. My concern is for my clients because the adversary system has been developed over many, many years for the protection of their rights.

Under our present system, the opposing party is responsible for identifying and seeking pre-trial information that might be relevant to the case. My clients do not now have an obligation to pay me to make an exhaustive investigation of all aspects of a case so I can furnish all this information to the opposing party.

Under these proposed changes, my clients will be required to help me identify all information that might be relevant to facts pleaded in my opponent's complaint and to voluntarily provide that information to my opponent before it is requested. This will require my clients to pay me to do the work my opponent is now required to do.

Although I am an officer of the court, my duty to advance the interests of my clients must be paramount. The obvious purpose for this duty is to protect the rights of my clients. It is not to protect my rights or my personal economic interests. My clients will naturally want to hire attorneys who best advance their interests.

Under these proposals, for the first time, I would have a continuing, affirmative obligation to seek and disclose to the opposing party information adverse to my clients' interests.

This is certainly fundamentally unfair to my clients and it clearly places me in a particularly treacherous position. It is a dramatic departure from the adversary system which is as old as our country itself.

Before such a drastic change in our civil justice system is implemented, I sincerely believe more deliberate study and debate is needed. This departure from such a fundamental aspect of our civil justice system is an untested process and it should not be made at this time.

Another serious concern I have about the proposed disclosure process is that it would seriously undermine protection and rights provided to my clients under the attorney work product doctrine. Under the present system, I am not required to reveal the theory of my clients' case or reveal a line of factual inquiry or legal reasoning that my opponent never would have considered on his or her own. If the changes to Rule 26 are approved, I will be required to reveal my mental impressions and legal judgments when I use my best efforts to determine what might be "relevant" to facts pleaded with "particularity" in the pleadings.

The proposed changes will also undermine protection afforded that will be under the attorney-client privilege which encourages full disclosure of facts from the clients to the attorney. Under these changes, I will be required to disclose to the opposition everything

I have learned during the investigation from my clients about the case. This creates the anomalous situation where the clients are potentially penalized by the attorney's exercise of due diligence as disclosure to the adversary is increased when more information has been uncovered.

Clients have a right to know that their own attorney will not be conducting a vigorous and extensive investigation to find negative or self-destructive information so that it can be voluntarily turned over to their adversary. Under the disclosure system, clients' confidential communications to the attorney may no longer be protected. The candor and trust between clients and attorney will be seriously impaired.

BACKGROUND

The notes to proposed Rule 26 state that the concepts of imposing a duty of disclosure are contained in two law review articles - one from 1979 by Wayne D. Brazil, then an associate professor of law at the University of Missouri - Columbia and now a magistrate judge in the Northern District of California,¹ and the other from 1989 by Judge William D. Schwarzer, then of the Northern District of California and now Director of the Federal Judicial Center.²

¹ Brazil, The Adversary Character of Civil Discovery: A Critique and Proposals for Change, 31 Vand.L.Rev. 1295 (1978).

² Schwarzer, The Federal Rules, the Adversary Process and Discovery Reform, 50 U.Pitt.L.Rev. 703, 721-723 (1989).

There is little doubt that the intent of the Judicial Conference Advisory Committee in proposing the Rule 26 amendments is to confront and change the delicate balance of counsel's responsibility to court and client — now tipped decisively in favor of the clients by Rule 1.3 of the American Bar Association Model Rules of Professional Conduct — in favor of a newly declared emphasis on responsibility to assist the court. One need look no further than the simple amendment to Rule 1, to which two words will be added: "These rules. . .shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." (emphasis supplied)

According to the letter transmitting the proposed amendments from the Chairman of the Judiciary Conference Advisory Committee to the Chairman of its Standing Committee, the explanation for adding the two words is:

In calling for the rules to be construed "and administered" to secure the just, speedy, and inexpensive determination of every civil action, the simple revision highlights the central theme and purpose of the other proposed amendments. Judges and attorneys share the responsibility to see that the rules are utilized to achieve this objective.³

But beyond this recitation of what might be characterized as a simple and practical extension of attorneys' current responsibilities, one finds confirmation of a new duty to help the adversary in the Committee Notes to proposed Rule 26(a)(1):

Subparagraph (A) requires identification of all persons likely to have information that bears significantly on any of the

³ Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, August 1991, at 1.

claims and defenses presented by the pleadings in the case, including damages. The limitation to those with "significant" information is not intended to provide an excuse for failure to identify persons whose information would not support the party's contentions. . . . As officers of the court, counsel are expected to disclose the identity of those persons who, if their potential testimony were known, might reasonably be expected to be deposed or called as a witness by any of the parties. Indicating briefly the general topics on which such persons have information should not be burdensome, and will assist other parties in deciding whether their depositions will actually be needed.⁴

And just to nail it down, Judge Schwarzer has written:

Once it becomes routine and counsel become more generally aware of their professional obligations as officers of the court, disclosure should reduce the burdensome and unproductive adversariness that now often characterizes discovery. . . . Evasion and manipulation will be reduced as attorneys recognize the rules to reflect their obligation as officers of the court to eschew surprise and reveal even damaging information, without engaging in the discovery games now so prevalent [see committee note to Rule 26(a)(1)].⁵

These changes indeed will create a new and different litigating ethic, in which the basis of claims or defenses will be founded "on wits borrowed from the adversary," to quote the famous remark of Justice Jackson in Hickman v. Taylor.⁶

⁴ Id. at 27 (emphasis supplied).

⁵ Schwarzer, New Discoveries for the Discovery Process, Legal Times, Nov. 25, 1991, at 25-26.

⁶ 329 U.S. 495, 516 (1947).

This increase in the obligations of attorneys to the court is not accompanied by any corresponding decrease in their responsibilities to clients. Nor could it be. The source of this ethical shift, according to Judge Schwarzer, is the civil law, which he says "for the pretrial stages of litigation bears sympathetic examination, if not emulation. That practice involves the staged development of the case under the direction of the judge, with a gradual narrowing of issues as the facts are marshalled. The process is deliberate and controlled, not competitive or confrontational."⁷

One might assume as a matter of procedure, to say nothing of substance, that a signal revision of this magnitude in the ethical responsibilities of lawyers to their clients could not be accomplished by a simple amendment to the Federal Rules of Civil Procedure. Surely the extensive debate that attended even minor changes to the ABA Model Rules of Professional Conduct, as well as the permutations of those rules adopted by the states and other jurisdictions, suggests that a revision of this character would invite, indeed command, extensive, prolonged and difficult consideration.⁸

There can be no debate about this reality:

The legal community has made it clear that it is a breach of professional responsibility for a litigator to elevate full disclosure above partisan interests by revealing, unless clearly compelled to do so, probative evidence that is damaging to the client. Strong professional sanctions can be imposed

⁷ Schwarzer, Federal Rules, *supra* Note 2, at 717.

⁸ See Schneyer, Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct, 14 Law & Soc. Inquiry 677, 678 (1989).

against litigators who follow such a course. Marketplace economics further reinforce these pressures.⁹

SUPREME COURT TRANSMITTAL

The irreconcilable ethical problems that would be created for attorneys is best summarized in the dissenting statement of Justices Scalia, Thomas and Souter in the Chief Justice's transmittal of these rules changes to Speaker Foley:

The proposed new regime does not fit comfortably within the American judicial system, which relies on adversarial litigation to develop the facts before a neutral decisionmaker. By placing upon attorneys the obligation to disclose information damaging to their clients — on their own initiative, and in a context where the lines between what must be disclosed and what need not be disclosed are not clear but require the exercise of considerable judgment — the new Rule would place intolerable strain upon attorneys' ethical duty to represent their clients and not to assist the opposing side. Requiring a attorney to make a judgment as to what information is "relevant to disputed facts" plainly requires him to use his professional skills in the service of the adversary. See Advisory Committee Notes to Proposed Rule 26, p. 96.

THE ARIZONA EXPERIENCE

Some of the ethical problems associated with a similar experimental disclosure scheme adopted in Arizona are discussed in a local bar association publication by DRI colleague, Robert J. Bruno of the Teilbourg, Sanders & Parks firm in Phoenix.¹⁰

⁹ Frankel, The Search for Truth: An Umpireal View, 123 U.Pa.L.Rev. 1031, 1312 (1975).

¹⁰ Bruno, The Disclosure Rule is a Mistake, Maricopa Lawyer, June 1992.

He says that when receiving written referral of defense of a new lawsuit with a request to send out detailed interrogatories addressing all aspects of the claim, depose all witnesses having knowledge of material facts and protect the clients' interest in the litigation, he will need to send a letter similar to the following:

Thank you for referral of defense of this new case. I note your request that I issue detailed interrogatories and depose all material witnesses. Apparently, you are not aware of the recent amendments to the Rules of Civil Procedure.

In lieu of proceeding with these traditional discovery techniques, it is now the obligation of each party to disclose to the other all facts which are material. Accordingly, we should schedule a meeting at the earliest possible opportunity, at which time you should be prepared to provide an outline, which I will immediately provide to plaintiff's attorney, of all facts which tend to support the claims for relief the plaintiff has set forth in the complaint.

Furthermore, if the plaintiff has failed to pursue any appropriate claims against your company, we should also gather and pass on to plaintiff's counsel all facts which he would want to know that he might amend his claim to pursue any additional theories of relief against your company.

Additionally, if you or your employees are aware of any facts which would support a claim for punitive damages, please organize all that information in a format which will be easily understandable to plaintiff's counsel. Although no theories claiming punitive damages have been pled, the plaintiff's attorney would assuredly be interested in learning any facts which would justify a punitive claim, and I am certain he would be anxious to amend the complaint to include such a prayer for relief. It is our obligation to exercise our best efforts to collect the appropriate data which the plaintiff's attorney would want to learn about, and I am sure punitive damages would be high on his list.

Finally, for me to establish to the court that I have fulfilled my obligation of due diligence, I would like to arrange for members of my firm to interview the employees of your company scattered in your branch offices in all 50 states. It is possible that your employees have knowledge which the plaintiff's attorney would find helpful in asserting his claim against your company and it is my obligation to exercise reasonable diligence to collect that data.

I remain your zealous advocate, to the extent allowed by the new rules.

Mr. Bruno's observations continue. The preamble to the Arizona Rules of Professional Conduct states that: "As advocate, a attorney zealously asserts the clients' position under the rules of the adversary system." The comment to Ethical Rule 3.4 of the Arizona Rules of Professional Conduct indicates that: "The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties."

How can you reconcile the adversary system, the competitive marshalling of evidence and the zealous representation of clients, he says, with the requirements of the disclosure rule?

He correctly observes that the requirements of the disclosure militate against good lawyering. Clients, he says, will be reluctant to hire a attorney who has represented their business before lest the attorney know too much that he or she is forced to disclose to the other side.

We must ask ourselves today: When choosing between two attorneys equally good in appearance and speaking ability, is there going to be a subtle motivation to hire the attorney who has a more relaxed work ethic opposed to the attorney who is industrious and will dig endlessly through the company's records uncovering facts and diligently turning those facts over to the plaintiff's attorney? Is there a subtle motivation to hire the less industrious attorney?

Mr. Bruno also expresses concern that he has not yet heard any satisfactory answers to questions about what has happened to the protection of the attorney/client privilege and the work product doctrine and to an attorney's role as an advocate for his or her clients. As a result, he poses another hypothetical regarding the "continuing duty" to "seasonably" make "new or different information" available to opposing counsel.

I am at a deposition. We take a break and, during the break, my client says to me:

Bob, I thought of something while the other attorney was questioning me. He has never addressed this issue, either in an interrogatory or earlier in the deposition. However, his other questions reminded me that, several years ago, we did have a claim similar to this one. I thought you should know about it so you will not be caught off guard if opposing counsel does ask about prior cases.

I respond to my client as follows:

Jack, thanks for confiding in me. We won't have to wait for the other attorney to ask the question because, as soon as we go back into the deposition room, I am going to make a reasonable disclosure of everything you have just told me. Despite the fact that you and I maintain an attorney/client relationship and despite the fact that the Rules of the Supreme Court require me to "maintain inviolate," the confidences you place in me,

nonetheless, the new rules of disclosure require that I reasonably advise opposing counsel of new or additional information "whenever new or different information is discovered or revealed."

Therefore, having learned of this information during this deposition, I had better tell the other attorney about it right now. If I fail to do so, a judge could find that my disclosure is not "reasonable" and could sanction me personally. I have to balance my ethical duty to maintain your confidences against my ethical duty to follow the new disclosure rules. The judges seem rather intent on enforcing these disclosure rules.

Frankly, I cannot afford to pay potential sanctions personally and, therefore, I intend to disclose our conversation to opposing counsel.

UNANSWERED ETHICAL PROBLEMS

Is the client put in the ethical dilemma of making its own determinations as to the material and relevant facts the attorney ought to know about? Is the attorney who disagrees with his or her clients whether something is relevant or irrelevant to the case obliged to withdraw from representation if the clients directs the attorney to assume the position that the information is not relevant? Is the attorney who decides to remain in the case going to be subjected to court-imposed sanctions that the attorney herself or himself must pay for failing to make disclosure when the attorney is operating under the clients direction?

Little comfort is found in assurances that the ethical dilemmas of disclosure will be resolved on a case-by-case basis in an even-handed manner by members of our federal judiciary. Although we have great respect for our trial court judges, we are going to be confronted with hundreds of different judges having hundreds of different opinions as to what the ethics are of disclosure in one circumstances versus another.

It is not necessary to create ethical conflicts for every attorney to deal with those few who abuse the prosecution system. Abusers of the current system can be dealt with by enforcement of the rules which already exist.

CONCLUSION

Although the federal rulemaking process expressly contemplates some congressional oversight, we are told by commentators that primary control over the process was vested in the judicial branch in part so that the rules would benefit from the vastly greater experience and insight into the litigation process that judges have over legislators. Congress has historically become involved with the rulemaking process only when the process was not responsive to public concerns. We are grateful for the work of the U.S. Judicial Conference Committee on Rules and we have great respect for the integrity of the rulemaking process. Unfortunately, however, the unanswered ethical dilemmas, alone, make implementation of Rule 26 changes requiring non-adversarial disclosure a mistake at this time. We respectfully urge their deletion from the currently proposed amendments to the Federal Rules of Civil Procedure.

Thank you for the opportunity to presenting these views on the most radical changes proposed to the Federal Rules of Civil Procedure since their implementation in 1938.

Mr. HUGHES. Mr. Dunlap, welcome.

**STATEMENT OF F. THOMAS DUNLAP, JR., VICE PRESIDENT,
GENERAL COUNSEL AND SECRETARY, INTEL CORP.**

Mr. DUNLAP. Thank you, Mr. Chairman, members of the subcommittee.

As the general counsel for a high technology company, the main concern for the Civil Justice Reform Act deals with the speed to get to trial and the effect that has on competition in our industry, because in order to have the research and development expenses that we need in this industry, which in 1993 will be around \$900 million for Intel, and to build these facilities to make these chips, we will have to invest over a billion dollars in capital equipment each year. It becomes very important that we can protect this research and development with the intellectual property laws.

While we have the correct intellectual property laws in this country, and I believe the courts have generally been interpreting them consistent with the ongoing technology, we are left with the problem: If we don't have timely enforcement, the laws will not be effective.

In other words, if a typical product cycle is 2 to 4 years, and it takes that long to get through the court system, we don't have an adequate remedy. And the type of case that we are quite often involved in is either patent or copyright, trade secret case, some type of intellectual property case, very complex and very technical. But the cost of the litigation or a nondecision out of the litigation is very expensive to our industry: Not just the cost of litigation, the cost of not having a decision is a significant problem.

That is the reason that I favor the current rules as they are proposed here. I believe that they will help us get speedier decisions, and particularly the rules that have specific limits, the most important and the most measurable rules, for example, are the rules on 10 depositions. If we only have 10 depositions, that is helpful. The limit on 25 interrogatories is also very helpful. Just by the nature of those, they are going to reduce discovery.

Now, the most controversy that we have heard today is with respect to rule 26(a)(1). But that is also one of the more important rules because of the fact that document production does take the most time and most expense in litigation. So these other rules aren't quite enough.

And so far, with the CJRA being in effect now for a number of years, we haven't gone through a complete set of cases, because they take longer than these rules have been in effect. But nevertheless, the experience that we have had so far in a number of districts has been very positive, particularly in the Eastern District of Texas and in the Northern District of California.

Now, both jurisdictions have slightly different rules from the proposed 26(a)(1), but the concept is the same; that is, to require some type of early mandatory disclosure. And our experience has been exactly what Judge Pointer explained earlier.

To give you an example, in the Eastern District of Texas, the judge made it very clear to us, there should be complete disclosure. This is like a substitute for document production.

We went, each side went and had that disclosure, asked for some document requests. The judge clearly said, "No, we are not doing that; we are going to move this case along." We had then a conference where there was some dispute as to what information would be disclosed. Before we had to file any motions. We resolved the matter. So in fact this exchange back and forth of requests was eliminated in that case.

And in the Northern District of California, slightly different rules, we had a similar experience and believed that the same thing would happen.

Now, rule 26, like any rule, is not going to be perfect for all situations, but I think that the idea of mandatory disclosure plus control by the magistrate and the judges will be able to speed up the litigation process, and particularly in these complicated intellectual property cases.

Thank you.

Mr. HUGHES. Thank you very much, Mr. Dunlap.

[The prepared statement of Mr. Dunlap follows:]

PREPARED STATEMENT OF F. THOMAS DUNLAP, JR., VICE PRESIDENT, GENERAL COUNSEL AND SECRETARY, INTEL CORP.

OVERVIEW

Intel wishes to express its support for the dedicated efforts of the Judicial Conference, the Supreme Court and this Committee to streamline the present burdensome and expensive litigation process. Intel believes the process can be streamlined even further as we gain experience with the new rules without diminishing any fundamental rights or preventing zealous advocacy. There will always be debate on how the process can be improved, but few can argue with the principles sought to be advanced by these present proposed rules: judicial economy, an acceleration of the process, and decreased costs.

1. INTEL: INNOVATION

I am the General Counsel of Intel which is a high technology company based in Santa Clara, California, with major manufacturing facilities in New Mexico, Arizona and Oregon. Intel's product line is centered around the microprocessor which you can think of as the brains of many of today's computers. In order to compete internationally in this business, in 1993 we have invested over nine hundred million dollars in research and development and over 1.2 billion dollars in capital equipment. Article I of the U.S. Constitution provides rewards to innovators who invest at this type of rate. Today's intellectual property laws, that is patents, copyrights, trademarks, mask work laws, provide for the appropriate type of protection for innovation. Congress has been able to adapt the statutes to properly protect the latest technology and the courts have been able to interpret the law to provide appropriate protection. The issue before this committee is the speed at which the courts can enforce this protection.

2. COMPETITIVENESS REQUIRES "JUST IN TIME BUSINESS"

The one thing to which the courts have been unable to adapt, is the speed at which business is conducted today. Throughout our industry, people talk about "just in time business." This means getting information or product at the right place, at the right time. Just as it is important for us to have just in time business, it is important that we have just in time justice.

In the semiconductor business, competitiveness requires the development of basic technology, the design of excellent products, the capacity to build those products and, finally, intellectual property protection to provide a return on our substantial investment. As an innovator, Intel needs speedy court decisions so that it can obtain the reward which the various intellectual property statutes bestow on the innovator. We are currently engaged in numerous lawsuits to enforce our intellectual property rights. Speedy court decisions are important to maintain our competitiveness in a

fiercely competitive international market. Intel's product cycles are often 2-4 years so we cannot afford litigation which takes much more than 1 year to resolve.

The obvious bottleneck in the judicial system is the discovery process. It is by far the most expensive and time consuming part of litigation. The cost to business of an uncertain competitive situation far outweighs the expense of litigation. So, speed is the critical factor. Cases cannot reach a speedy conclusion unless discovery is efficiently managed.

RULES 30, 32, 33, 34 AND 36

There should be no changes to the Proposed Rules 30, 32, 33, 34 and 36. Each of these proposed rules, if enacted by Congress as presently drafted and if subsequently administered by the district courts as intended, will significantly reduce the present burden and cost in our litigation process. Most cases do not need more than ten depositions per party, or more than twenty-five interrogatories. These new proposed rules rationally limit the number of such devices. If applied as intended, these rules alone will greatly improve the process and significantly reduce costs.

However, the district courts must be given clear guidance that applying these rules to presumptively limit discovery is the intent of the Supreme Court and Congress. Without such clear direction, many courts may fear departure from the "open discovery" philosophical status quo will only generate appellate reversals and, as a consequence, will not apply the new rules according to the principles underlying their enactment.

RULE 26(a)(1)

The most time consuming part of discovery is document production. Rule 26(a)(1) is a step towards streamlining document production by implementing a disclosure system. I am currently involved in litigation in the Eastern District of Texas and the Northern District of California which both have some form of required disclosure. The Texas disclosure system is a total substitute for document requests. We have a similar program in California but the initial disclosure is not as detailed. However, some magistrates are requiring more detailed disclosure similar to Texas to expedite discovery.

Proposed Rule 26, it is, admittedly, not perfect in all situations, but Intel believes the proposed new rule may not go far enough but is superior to the present rule. Most of the disagreement with the new rule appears to be directed at its mandatory disclosure requirements relating to documents. Intel supports the concept of mandatory disclosures.

The local rules of the Eastern District of Texas provide a workable model as to the extent of the mandatory initial disclosures. There, status conferences are held to determine the scope of the disclosures and no additional requests for production can be served without prior court approval. Moreover, only documents that "bear significantly on a claim or defense" initially need to be disclosed. These reasonable limitations on such an intrusive and costly discovery device are warranted and overdue. If properly applied at the district court level, proposed Rule 26 can achieve significant reductions in the cost and delay inherent in the present litigation philosophy.

Intel is involved in approximately ten major litigations at any one time. Typically, we are involved with intellectual property lawsuits, but we have also been defendants in seven frivolous shareholder lawsuits. In either situation, mandatory disclosure would be helpful in streamlining litigation. Consequently, I urge passage of these proposed rules.

No matter what rules are actually passed, we also need to send a very strong message to the lawyers, judges and magistrates in this country. That message is that the competitiveness of the United States industry requires just in time justice. That means we need to have time to trial resulting in faster court decisions. Faster decisions can only occur if discovery is streamlined and managed along the lines of these proposed rules. While these rules are a positive first step, we will have to learn how to work within the new system which provides judges and the magistrates a framework to expedite discovery so that the cases can go to trial quickly.

MANAGED DISCOVERY

Intel believes that there must be an acceleration of the litigation for all cases and especially in cases alleging violations of intellectual property rights. Intel supports the present modifications of the rules as outlined in my testimony and asks this Committee to consider an even more accelerated calendar for intellectual property cases. At least, encourage the courts to manage intellectual property cases to obtain

a final decision in 12 to 18 months. Intel believes that all intellectual property cases can, and must be, decided within 12 to 18 months from filing, as is presently done in proceedings before the International Trade Commission. This expedited time frame, which is warranted in these cases because of the significant potential impact of their outcome on domestic and international markets and the rapidly advancing technology involved, can be achieved if, over time, local rules implementing new Rule 26 are adopted similar to those local rules utilized in the Eastern District of Texas.

Mr. HUGHES. Mr. Cortese, before we take your testimony—in fact let's go, if we could—let's try to take your testimony. Then we are going to have to break because we have two votes.

Mr. Cortese, welcome.

**STATEMENT OF ALFRED W. CORTESE, JR., ATTORNEY, ON
BEHALF OF LAWYERS FOR CIVIL JUSTICE**

Mr. CORTESE. Thank you, Mr. Chairman, members of the committee.

I want to commend the committee for having these hearings and really for the open and candid way in which you have approached this problem. I think these hearings so far have been very useful, and I hope we can add to the committee's information.

I want to say first of all that my views represent the views of the Business Roundtable Lawyers Committee, the Chamber of Commerce of the United States, the National Association of Manufacturers, the Association of American Railroads, the American Automobile Manufacturers Association, the American Bankers Association, the Product Liability Advisory Council, the Defense Research Institute, the Federation of Insurance and Corporate Counsel, International Association for Defense Counsel, and Lawyers for Civil Justice.

Now that I have used up almost all my time, I had better get to the merits of this.

I say that, Mr. Chairman, because I wanted to reflect to you the tremendous feeling and controversy that surrounds 26(a)(1), and my testimony will be devoted exclusively to 26(a)(1), and that has been made known throughout the process of the adoption of these rules, and in fact many, many, many companies, many individual practitioners, many consumer groups, the plaintiff lawyers, defense lawyers, all the litigants, basically, if you were to count them up, are not buying disclosure.

Now, there are a few voices which I would refer to as voices in the wilderness that say, "Well, let's give it a try." I think maybe that is a reflection of what I would like to call the Brooks theorem. That is not Jack Brooks; it is Mel Brooks. But basically that is that "beauty is in the eye of William Holden." I would like to say there are a lot more William Holdens on the side of opposing disclosure, many, many thousands more, than there are those that support disclosure, or even that support the experimentation with disclosure.

And what we would like to submit to you, Your Honor, Mr. Chairman, is that the committee craft a bill that would delete 26(a)(1) from the amendments. And I think that, in fact, probably would be the least invasive that Congress could be with respect to the Rules Enabling Act process.

Now, the organizations that I represent—and I know you will hear this from Mr. Frazza and Mr. Higgins because they share these views and join in the views of those organizations—that we like the Rules Enabling Act process for the most part.

When it comes to a point where congressional oversight needs to be exercised, then that is a most appropriate opportunity for the exercise of that oversight, and that oversight should be and has been in the past narrow and specific, and that is what we are asking to you do.

In fact, I was very interested by Judge Pointer's and Judge Keeton's comments that they would prefer that disclosure at least in this formulation be rejected than that it be deferred.

And I think that springs from a feeling that we share that that perhaps would be the least invasive action that Congress could take and would settle the issue, and we could get on with some of these other very significant and very important reforms, so that Mr. Dunlap and other litigants who want speedier justice can get that.

And, in fact, you talk about the meet and confer, which has had substantial exposure and experience, you talk about limits on discovery, all of those things should be allowed to take effect. But as far as disclosure is concerned, there is just too much opposition to it as a concept, and too much concern that it will cause more problems than it will solve for Congress not to do something about it.

Let me just very briefly hit on a couple of the reasons why that is the case. Now, an overwhelming majority, as I have indicated, opposes mandatory predisclosure disclosure. For example, approximately 260 comments were filed dealing with disclosure, with the conference. Two hundred and fifty of them, approximately, were opposed to disclosure.

Ten Federal judges filed comments. Two of them were favorable. One was Judge Schwarzer and one was Magistrate Judge Brazil, both of whom have connections obviously with the process, and would be expected to support it. Eight other working trial judges opposed disclosure very, very strenuously.

Seventeen witnesses appeared at the two hearings that were held on these rules as a whole opposing specifically disclosure. And as you have heard, the committee itself reversed its field at least once on this issue. We feel, and Mr. Higgins and Mr. Frazza will make these points very specifically from their own experiences as general counsel of major corporations involved in litigation, in effect the customers of the system, that it will not be a remedy in the cases where you really need it.

And if it is a remedy at all, it is only in those cases where it is not needed. There has to be some distinction in how this is applied. Although there may be some experience that it may be applied appropriately in some cases, in most cases it probably will not be applied appropriately.

For example, I have got a stack of papers here from Texas, as a matter of fact, from the Eastern District of Texas that Mr. Dunlap said he had just good experience in. This is one round of motions and disclosure in a case that is 1 of 15 cases that the same plaintiff's lawyer has had pending for several years, in a case

where massive discovery has already been made. It is a fairly typical product litigation, product defect litigation.

A reading room has been established in this case and in this group of cases, and what the lawyers are doing is they are fighting about what disclosure should be made and what disclosure shouldn't have been made. That is what all this paper is all about.

Now, that we don't need.

Mr. HUGHES. Let me just interrupt you, if I might. I apologize for having to do this, but we have got about 5 minutes left to catch that vote. So we are going to recess for this vote and perhaps a second vote. As soon as they are over, we will come right back.

The committee stands in recess.

[Recess.]

Mr. HUGHES. The subcommittee will come to order. I apologize for the delay and for the way this has been stretched out today.

Mr. Cortese, I apologize for the interruption. You may continue summarizing your statement.

Mr. CORTESE. I have a couple of quick points.

First of all, obviously, we are in favor of striking 26(a)(1) from the amendments and letting the other amendments proceed with respect to the discovery rules, and I would like to summarize the reasons for that. We feel that prediscovery disclosure will increase the motion practice and satellite litigation. It will promote overdisclosure and increase, not reduce, discovery costs, delay, and abuse.

I would like to refer to the study, the famous Arizona study from Maricopa County. This is reported in the Maricopa Lawyer.

It was a study by the Arizona Defense Association, and there were questionnaires sent out to 500 attorneys; 171 of them returned their opinions. The responses were up to 10 to 1 in some instances that the rules have chilled clients' willingness to level with their own attorney; have increased costs to clients; caused conflict with other Supreme Court rules; led to difficulty for attorneys to keep the confidence and secrets of clients.

Let me give you a couple of the responses. Question one: Some have expressed concern that the new rules obligating a lawyer to disclose relevant information to opposing counsel will create a chilling effect on clients' willingness to level with their own attorneys. Is this concern valid? One hundred and thirty-seven said, yes, it is valid. Frivolous, 16 said it was.

Question two, has the disclosure requirement of rule 26(1) increased or decreased cost of litigation for your clients? Increased, 110 said it had increased costs. Decreased costs, eight. No effect, 26. Undetermined, 30.

Those are the kinds of experience already in the record, I think, that the committee can take into account in really determining that disclosure is inconsistent with the adversary system and the work product doctrine; that it undermines the attorney-client privilege; and injects ethical dilemmas into the attorney-client relationship and is just not going to work, will not save any money.

I think what we have heard from those who would support disclosure—who are a handful of judges and one or two practitioners—that this one-size-fits-all is an appropriate thing to be tried. We would submit to you it ought not to be tried; and if it is, that

it ought to be deleted nationwide and that the experiments ought to go forward under the Civil Justice Reform Act.

We do not need another discovery weapon, what I would—with Your Honor's permission—characterize as the misguided missile of disclosure.

Thank you very much.

[The prepared statement of Mr. Cortese follows:]

STATEMENT OF

BUSINESS ROUNDTABLE LAWYERS COMMITTEE
 CHAMBER OF COMMERCE OF THE UNITED STATES
 NATIONAL ASSOCIATION OF MANUFACTURERS
 ASSOCIATION OF AMERICAN RAILROADS
 AMERICAN AUTOMOBILE MANUFACTURERS ASSOCIATION
 AMERICAN BANKERS ASSOCIATION
 PRODUCT LIABILITY ADVISORY COUNCIL, INC.
 DEFENSE RESEARCH INSTITUTE
 FEDERATION OF INSURANCE AND CORPORATE COUNSEL
 INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL
 LAWYERS FOR CIVIL JUSTICE

Submitted to

THE SUBCOMMITTEE ON INTELLECTUAL PROPERTY
 AND JUDICIAL ADMINISTRATION
 OF THE
 HOUSE JUDICIARY COMMITTEE

for the

JUNE 16, 1993 HEARING ON PROPOSED AMENDMENTS TO
 THE FEDERAL RULES OF CIVIL PROCEDURE

**CONGRESS SHOULD DELETE
 PROPOSED RULE 26(a)(1)
 MANDATORY PRE-DISCOVERY DISCLOSURE
 FROM PENDING AMENDMENTS TO
 THE FEDERAL RULES OF CIVIL PROCEDURE**

Introduction

The rulemaking committees of the Judicial Conference are to be commended for their dedicated efforts to eliminate seemingly intractable discovery problems. For the most part, we support the results of these efforts. Nonetheless, one of the recommended solutions -- adoption of the pending mandatory disclosure amendment in new Federal Rule of Civil Procedure 26(a)(1) -- will add to discovery problems, rather than help solve them.¹ Rule 26(a)(1) creates an entirely new, pre-discovery process imposing an untested obligation

¹ The text of proposed Rule 26(a)(1) is produced in Appendix A.

on federal litigants that is likely to increase motion practice and satellite litigation, cause more contentiousness between litigants, and place additional demands on scarce judicial resources — all results contrary to the stated purpose behind the proposed discovery amendments. Moreover, at its extremes, disclosure is sharply at odds with fundamental tenets of our adversary system of justice, and could compromise the attorney-client relationship as well as the attorney work product doctrine. Finally, the availability of automatic disclosure could have the unfortunate effect of burdening the courts with unnecessary litigation as lawsuits are commenced on speculative grounds that might not sustain discovery under current rules. This unfortunate impact could be exacerbated by the proposed changes to Rule 11 which could tempt parties into pleading with particularity wholly speculative factual assertions.²

"Congressional power to regulate practice and procedure in federal courts has been acknowledged by the Supreme Court since the early days of the Republic and is now assumed without question by the courts."³ Under the Rules Enabling Act,⁴ Congress is possessed of the authority, as well as the last opportunity, to decide whether proposed amendments to the Federal Rules of Civil Procedure will go into effect, and if so, what their

² The considerations affecting proposed Rule 11 changes are discussed in comments submitted by the American Insurance Association.

³ See The Judicial Improvements Act of 1990, Report of the Senate Comm. on the Judiciary, No. 416, 101st Cong., 2d Sess. 9 (1990) (quoting H.R. Rep. No. 422, 99th Cong., 1st Sess. 5-7 (1985)).

⁴ 28 U.S.C. § 2072.

content shall be.⁵ Congressional intervention in the rulemaking process, however, has been needed and exercised only on rare occasions. In particular, congressional action is contemplated and has been taken when, as now, the Judicial Conference proposes far-reaching policy changes that would fundamentally alter the civil justice system in a potentially harmful fashion or that conflict with a congressional mandate.⁶

The near universal opposition to engrafting disclosure onto a debilitated discovery process has stressed that disclosure would fundamentally and deleteriously alter basic policies that underpin our civil justice system, and that it would result in significant new obligations, costs, delays, and abuses that would potentially conflict with Congress' own plans for civil justice reform. Therefore, congressional intervention under the Rules Enabling Act is needed to strike disclosure from the proposed amendments to the rules governing discovery in the federal courts. Indeed, striking only the disclosure amendment in new Rule 26(a)(1) would be the least intrusive action Congress could take while still fulfilling its oversight obligation. The balance of the proposed amendments to the rules governing discovery should be permitted to take effect as proposed on December 1, 1993.⁷ As former Chief Justice Warren Burger once remarked about the rulemaking process, "[Rulemaking] is a joint enterprise, and while Congress has rendered us the compliment of

⁵ See, e.g., Hanna v. Plummer, 380 U.S. 460, 471-72 (1965); Sibbach v. Wilson & Co., 312 U.S. 1, 15 (1941); Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42 (1825); see also S. Rep. No. 101-416, supra note 3, (quoting H.R. Rep. No. 422, 99th Cong., 1st Sess. 5-7 (1985)); Winifred R. Brown, Federal Judicial Center, Federal Rulemaking: Problems and Possibilities 94 (June 1981).

⁶ Brown, supra note 5, at 94.

⁷ As previously noted, these comments do not address proposed changes to Rule 11.

general approval in the past, it does not mean that the Congress should accept blindly or on faith whatever we submit."⁸

I. THE CONTROVERSY SURROUNDING MANDATORY PRE-DISCOVERY DISCLOSURE SIGNALS THE NEED FOR SUBSTANTIVE CONGRESSIONAL OVERSIGHT OF THE PROPOSED AMENDMENT AS AUTHORIZED BY THE RULES ENABLING ACT.

The proposed mandatory, pre-discovery disclosure amendment engendered vigorous debate and controversy within and without the legal community while moving through the rules amendment process.⁹ Described by even its proponents as "radical",¹⁰ the controversy surrounding the disclosure process, and the near universal opposition to it from bench and bar were so great that at one point the Advisory Committee on Rules of Practice and Procedure decided to withdraw disclosure from the proposed amendments

⁸ Hearings on Proposed Rules of Evidence Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary-Supplement, 93d Cong., 1st Sess. 8-9 (1973), cited in, Note, Separation of Powers and the Federal Rules of Evidence, 26 Hastings L. J. 1059, 1074 n.166 (1975).

⁹ Of the roughly 264 written comments regarding disclosure that were submitted to the Judicial Conference Committees during the public comment period, 251 comments were negative. 70 individuals appeared at the two public hearings to testify against disclosure on behalf of a broad spectrum of businesses, bar associations, and public interest groups. See Appendix B for summary of comments in opposition to Rule 26(a)(1) disclosure; see Appendix C for a summary of organizations and individuals who submitted comments to the Rules Committee.

¹⁰ Linda Mullenix, Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking, 69 N.C. L. Rev. 795, 807 (1991) (citing cover memorandum from Professor Paul Carrington, Office of the Reporter, Advisory Committee on Civil Rules to the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (Feb. 22, 1990).

altogether.¹¹ Concerned several months later that withdrawal would unduly delay needed discovery reforms, the Committee opted to reinstate disclosure in modified form.¹² The modifications attempted to respond to the overriding complaint voiced by opponents that the standard for disclosure was unreasonably vague, particularly in light of notice pleading.¹³ However, the ultimate version of disclosure that emerged as proposed Rule 26(a)(1) was a slightly improved reformulation of a fundamentally flawed and unworkable concept.

Following approval by the Judicial Conference, the proposed amendments were considered by the Supreme Court prior to their presentation to Congress. Normally silent as to proposed rules amendments, the Supreme Court, through the Chief Justice's transmittal letter, expressly stated that the Court had assured itself only that proper procedures were followed during the rule promulgation process, and that Congress should not "necessarily" interpret the Court's action to mean that "the Court itself would have proposed these amendments in the form submitted."¹⁴ Indeed, Justice White, writing in

¹¹ Ann Pelham, Judges Make Quite A Discovery: Litigators Erupt, Kill Plan To Reform Federal Civil Rule, Legal Times, Mar. 16, 1992, at 1.

¹² Ann Pelham, Panel Flips, OKs Discovery Reform, Legal Times, Apr. 20, 1992, at 6; see also April 8, 1992 Memorandum of Honorable Ralph K. Winter, United States Court of Appeals, Second Circuit, to Honorable Sam C. Pointer, Jr., Regarding Reconsideration of Disclosure.

¹³ See April 8, 1992 Memorandum of Honorable Ralph K. Winter, supra note 12, at 3-4.

¹⁴ April 22, 1993 Letter From Chief Justice William H. Rehnquist to Speaker of the House of Representatives Thomas S. Foley transmitting proposed amendments to the Federal Rules of Civil Procedure, reprinted in Amendments to the Federal Rules of Civil Procedure and Forms, Communication from the Chief Justice of the United States

(continued...)

a separate statement, stressed the position that "it would be a mistake for the bench, the bar, or the Congress to assume that we are duplicating the function performed by the standing committee or the Judicial Conference with respect to changes in the various rules . . ."15

Three justices, Scalia, Souter, and Thomas, dissented from promulgation of the discovery amendments. They branded disclosure as an "extreme, costly, and essentially untested" departure from the norm that would undermine the adversary system and place an intolerable burden on lawyers' ethical duties, a result that is particularly objectionable because disclosure was "recommended in the face of nearly universal criticism from every conceivable sector of our judicial system."16

Ultimate authority over the civil rules process rests now, as it always has, with Congress. As early as 1825, Chief Justice Marshall clarified that the authority of the courts to regulate practice and procedure existed because of a delegation of authority from Congress.¹⁷ The Supreme Court has acknowledged and reiterated this fact in modern

¹⁴ (...continued)

Transmitted Amendments to the Federal Rules of Civil Procedure and Forms, Pursuant to 28 U.S.C. 2072, House Doc. No. 103-74, 103rd Cong., 1st Sess. (April 22, 1993) (GPO Doc. # 67-104)(hereinafter "Supreme Court Transmittal Reprint").

¹⁵ Statement of Justice White, accompanying Order and Memorandum Transmitting Amendments To The Federal Rules of Civil Procedure, April 22, 1993, at 6, reprinted in Supreme Court Transmittal Reprint, supra note 14, at 98-103.

¹⁶ Dissenting Statement of Justices Scalia, Souter, and Thomas accompanying Order and Memorandum Transmitting Amendments to the Federal Rules of Civil Procedure, April 22, 1993, reprinted in Supreme Court Transmittal Reprint, supra note 14, at 104-110.

¹⁷ "Congress has expressly enabled the Courts to regulate their practice, by other laws." Wayman v. Southard, 23 U.S. (10 Wheat.) at 42.

times.¹⁸ Moreover, when Congress made the current delegation of authority to the judicial branch with the 1934 adoption of the Rules Enabling Act, "theories of exclusive judicial power were not accepted with respect to national rulemaking. On the contrary, the language of the enabling act reflected the dominant view that the power belongs to Congress."¹⁹

Although Congress has intervened in the rulemaking process sparingly, those interventions have come in recent years. For example, in 1973, Congress delayed implementation of the Federal Rules of Evidence to revise the proposed amendments to the rules regarding privilege.²⁰ In 1974, Congress severed a number of controversial rules of criminal procedure, allowing only the balance of the proposed amendments to become effective as proposed.²¹ In 1976, Congress deferred implementation of proposed habeas corpus amendments.²² Congress modified amendments to the rules of criminal procedure

¹⁸ See Sibbach v. Wilson & Co., 312 U.S. at 15; Hanna v. Plummer, 380 U.S. at 471-72.

¹⁹ Brown, supra note 5, at 38-39. The early legislative history of congressional efforts to enact the Rules Enabling Act provides insight into Congress' views.

[T]he bill proposed will not deprive Congress of the power, if an occasion should arise, to regulate court practice, for it is not predicated upon the theory that the courts have inherent power to make rules of practice beyond the power of Congress to amend or repeal. On the contrary, Congress may revise the rules made by the Supreme Court, or by legislation may modify or entirely withdraw the delegation of power to that body. Report of the Comm. on the Judiciary, Authorizing Supreme Court to Make and Publish Rules in Common-Law Actions 7, S. Rep. No. 69-1174, 69th Cong., 1st Sess. (1926).

²⁰ See Pub. L. No. 93-12, 87 Stat. 9 (1973); Pub. L. No. 93-595 (1975) (adopting modified rules of evidence).

²¹ Pub. L. No. 93-361, 88 Stat. 397 (1974).

²² Pub. L. No. 94-349, 90 Stat. 822 (1976) (deferring implementation of habeas corpus amendments).

in 1979 to ensure that the new rules were consistent with amendments Congress was making to the criminal code at that same time.²³ In 1982 Congress withheld approval of proposed amendments to Federal Rule of Civil Procedure 4,²⁴ and subsequently adopted its own amended version of Rule 4.²⁵ Congress also made technical amendments to the bankruptcy rules in 1983,²⁶ and the criminal rules in 1986 and 1988.²⁷

In some cases Congress has modified federal practice and procedure of its own initiative, recognizing that "Congress' power to enact rules of procedure is limited only by the Constitution, and not by the Rules Enabling Act, . . ."²⁸ The most recent and far-reaching example is the Civil Justice Reform Act, which calls for broad experimentation with court practice and procedure by federal district courts in order to identify means to decrease costs and delay in federal courts.²⁹ Congress also exercised its procedural authority when it enacted the Speedy Trial Act to ensure prompt prosecution of criminal cases in federal

²³ Pub. L. No. 96-42, 93 Stat. 326 (1979) (delaying implementation of criminal rules to allow modifications consistent with pending legislation).

²⁴ Pub. L. No. 97-227, 96 Stat. 246 (1982).

²⁵ Pub. L. No. 97-462, 96 Stat. 2527 (1983).

²⁶ Pub. L. No. 98-91, 97 Stat. 607 (1983) (amending bankruptcy rules).

²⁷ See, e.g., Pub. L. No. 99-570, 100 Stat. 3207-8 (1986) (amending criminal rules); Pub. L. No. 99-646, 100 Stat. 3592 (1986) (amending criminal rules); Pub. L. No. 100-690, 102 Stat. 4181 (1988) (amending criminal rules).

²⁸ S. Rep. 416, supra note 3, at 10.

²⁹ Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (1990); see also H. Rep. No. 733, 101st Cong., 2d Sess. (Sept. 21, 1990); S. Rep. No. 416, 101st Cong., 2d Sess. (Aug. 3, 1990).

courts,³⁰ and when it provided for consolidation of civil litigation from multiple federal courts for pretrial purposes with passage of the multidistrict litigation statute.³¹ Consequently, there is ample authority and precedent to support congressional intervention now.

It is important to note that congressional intervention in the rulemaking process over the past twenty years has not denigrated the Rules Enabling Act process, and has not diminished the reputation, the excellent work product, or the integrity of the rulemaking committees of the Judicial Conference -- nor should it be allowed to. The members of the rules committees and their product reflect the hard work and dedication that committee members bring to bear on the often difficult challenges that face them. Congress has recognized that fact by targeting its interventions very narrowly, usually making only one or two very specific amendments to the pending proposals instead of undertaking wholesale revisions of the amendments in general. This minimally invasive approach is all that is necessary and appropriate here -- specifically, Congress need only excise Rule 26(a)(1) mandatory, pre-discovery disclosure relating to witnesses and documents and make certain conforming amendments -- the balance of the pending discovery amendments should be approved and implemented as promulgated. That action would permit a number of other somewhat less controversial discovery reforms to take effect December 1, 1993, including imposition of a meet and confer requirement prior to discovery, presumptive limits on the number of interrogatories and depositions, the exchange of expert reports, and other

³⁰ See 18 U.S.C. § 3161 (c)(1) (1988) (criminal defendant must be tried within 70 days from filing of information or indictment, or from appearance before court).

³¹ See 28 U.S.C. § 1407 (1988) (permitting consolidation of multiple lawsuits under the authority of one federal court for unified proceedings in certain lawsuits).

significant changes. In addition, striking only section 26(a)(1) preserves new 26(a)(2) and (3), which create a new disclosure provision related to expert witnesses and their testimony, and a disclosure obligation related to trial witnesses and materials.

A study of the federal courts' rulemaking process, conducted by the Federal Judicial Center in 1980, indicates that it is expected that Congress will hold hearings and conduct significant oversight when a particular proposal incites major public controversy.³² The study also indicated that the judicial branch recognizes that congressional review is particularly appropriate when sharp policy changes are involved in the proposed rules amendments.³³ Both of these elements are present in the current situation, and in light of the judicial branch's stated expectations, intervention by Congress should not be perceived as usurping judicial authority.

The proposed disclosure process has elicited unprecedented public outcry from litigants of every stripe. Moreover, it presages a profound change in a basic policy underpinning the American civil justice system by mandating a process that is non-adversarial and in which the attorney's traditional obligation to the client is transformed into a greater obligation to the opponent and the system itself. As such, significant congressional interest and intervention with regard to the disclosure proposal would be expected, and in the view of those submitting this statement, it is imperative.

³² Brown, supra note 5 at 53.

³³ Id. at 94.

**II. MANDATORY, PRE-DISCOVERY DISCLOSURE
SHOULD BE STRICKEN FROM THE PENDING AMENDMENTS.**

Mandatory, pre-discovery disclosure can be challenged on both practical and policy grounds. It is an untried, unworkable concept, particularly in complex litigation. Notwithstanding calls from the bench and bar for greater specificity in the disclosure obligation, its revised, and slightly improved formulation still includes ambiguities with which litigants will find it difficult to comply, and which courts will be required to resolve. Thus, rather than solving discovery abuse, disclosure simply adds another complication on top of an already troubled process. In many cases disclosure will require expensive pretrial activity where none would otherwise be appropriate or required. Disclosure is not supported by any empirical study of the discovery process, as numerous commentators have criticized.³⁴ It is at odds with the adversary system, the attorney-client relationship, and the work product doctrine. According to some, disclosure will "encourage the use of fact pleading," and "will [create] pressure to amend Rule 8(a)(2) to do away with notice pleading."³⁵

For all these reasons, disclosure will cause far more discovery problems than it has the potential to solve. Indeed, if disclosure is interpreted with anything less than strict adherence to its literal text and the accompanying Committee Notes, particularly under the rapid-fire conditions that exist in discovery, it becomes far more likely to trigger the dire consequences that many have predicted.

³⁴ See Mullenix, supra note 10.

³⁵ See Sherman L. Cohn, Notice Pleading: End of A 55-Year Experiment?, American Inns of Court Federal Practice Digest, April 1993, 17-18.

A. An Overwhelming Majority Opposes Mandatory, Pre-discovery Disclosure.

The strength and depth of the opposition to mandatory, pre-discovery disclosure cannot be overestimated. Ninety-five percent of the written public comments on disclosure submitted to the Committee on Rules of Practice and Procedure, and almost all of the public testimony at the Committee hearings in Los Angeles and Atlanta in November of 1991 and February of 1992 were in opposition to disclosure as a concept and in practice. The opposition came from all segments of the legal community, including sitting federal judges, academics, large and small businesses, trade associations, the defense bar, consumer groups, the plaintiffs' bar, bar association groups, and individual practitioners. The level of opposition should be of great concern because successful implementation of disclosure in the federal courts will depend, in large part, on the commitment and good will of those litigants and counsel who are required to use it.

B. Mandatory, Pre-discovery Disclosure Will Increase Motion Practice And Satellite Litigation, Promote Overdisclosure, And Thereby Increase Discovery Cost, Delay, and Abuse.

Instead of decreasing discovery cost, delay, and abuse, mandatory, pre-discovery disclosure is far more likely to exacerbate them. Because of uncertainty over the precise meaning of the disclosure standard, which includes the frequently litigated term "relevant" and the previously unknown phrase "set forth with particularity in the pleadings," courts may be inundated with motions to define these terms with greater certainty or to decide whether they have been satisfied in a particular case. Other motions are likely to be urged under Rule 12(e) for more definite statements of the facts in the complaint or the answer. The likelihood that motion practice will increase is great because of the severe

sanctions that could attach under Rule 37 – including default judgment -- if the disclosure obligation is not satisfactorily met. The severity of the sanctions, in turn, may promote more satellite litigation and appeals as parties attempt to protect themselves as best they can from the harsh application of an uncertain new process.

In order to avoid sanctions and satisfy the new rule, parties are likely to engage in overdisclosure, giving the disclosure standard the broadest feasible interpretation. This not only results in unnecessary expense for the disclosing party, but it also wastes the resources of the party receiving the disclosure, who must take the trouble to sort through and analyze the material.

The ambiguity of the new disclosure standard creates an amorphous new risk for litigants. The risk exists regardless of whether a litigant discloses too much or too little, and it makes court involvement in resolving disclosure conflicts highly probable. Litigation cost, delay, and abuse is likely to increase if mandatory, pre-discovery disclosure becomes the rule.

**C. Mandatory, Pre-discovery Disclosure May
Be A Remedy, If At All, Only In Cases Where
Discovery Is Not A Problem Under Current Rules.**

A just released study, conducted under the auspices of the National Center for State Courts ("NCSC"), examined discovery in state trial courts.³⁶ The NCSC study can be

³⁶ The major flaws in the premises behind the disclosure proposal are shown in sharp relief when it is compared to an extensive study recently conducted of discovery in the state court system, published under the auspices of the National Center for State Courts. See Susan Keilitz, Roger Hanson & Henry W.K. Daley, Is Civil Discovery in State Trial Courts Out of Control? (1993) (manuscript, publication pending) ("State Court Study I"); Susan Keilitz, Roger Hanson & Richard Semiatin, Attorneys' Views of Civil Discovery (1993) (manuscript, publication pending) ("State Court Study II"). Earlier
(continued...)

understood to have identified three different levels of discovery activity in the cases examined. In one category of cases amounting to 42% of the 2,190 state cases reviewed, there was no discovery at all.³⁷ Consequently, there were no discovery costs or delays in these cases. In a second category, very little discovery was undertaken, and discovery worked relatively well. In the third category, involving complex cases such as product liability litigation, significant discovery was undertaken and significant discovery problems were encountered. Analyzing the likely effect of mandatory, pre-discovery disclosure on these three categories of cases, it can be concluded that at best, disclosure is potentially workable only in the second category of cases where discovery already works well. Yet disclosure would be unnecessary in those cases because there are no discovery problems to solve.

The proposed mandatory, pre-discovery disclosure process makes no allowance for those situations where no discovery is necessary or appropriate. Instead, disclosure would force parties, even in the simplest of cases, to undergo the effort and to incur the expense of making initial disclosures, unless they affirmatively stipulate around the disclosure obligation or the court so orders. The Committee Notes accompanying the proposed amendment indicate that disclosure, in essence, was intended to be "the functional equivalent" of standing interrogatories "from the court," and as such would not be unduly burdensome. However, as the recent NCSC study shows, in a significant number of cases

³⁶ (...continued)
studies of federal courts support extrapolation of the state figures to the federal courts. See State Court Study I, supra, citing Connolly et al., 1978.

³⁷ See generally State Court Study I, supra note 36 at 8.

no interrogatories are exchanged. Consequently, in those cases where discovery normally would not take place at all, disclosure is a potential solution in search of a problem. More important in those cases, however, it is highly likely that disclosure will have precisely the opposite effect of that which was intended; that is, disclosure will increase cost, delay, and abuse instead of reducing them.

Just as clearly, disclosure will impose inordinate costs and delays in complex litigation. Complex litigation often starts with multiple parties, vaguely outlined claims and defenses, sketchy facts, and above all a great deal of uncertainty. Common sense dictates that it generally, if not always, will not be possible in complex litigation to determine what the disclosure obligation is and to whom that obligation runs. Witnesses will be unknown early in the litigation. Hundreds of thousands, or even millions, of documents may or may not be at issue depending on what the facts are and who the parties might be.

Yet under the proposed mandatory, pre-discovery disclosure process, litigants could be charged with the responsibility of knowing early on not only what is relevant in terms of witnesses and documents regarding their own case, but also understanding their opponent's position well enough to surmise what would be relevant and necessary to the opponent's case. The obligation to decipher an opponent's case early on subjects a litigant to a real risk of significant sanctions for failing to reach the same assessment of what was relevant for disclosure purposes as the sanctions judge might reach in hindsight.

Since it is not likely that a process such as disclosure could resolve the discovery problems that are su*j* generis to complex litigation, and since disclosure certainly will not improve cases where little or no discovery takes place, the potential utility of the proposed disclosure process must be regarded as very limited. At best, disclosure would only

have a chance of being successful in those cases where it is not needed. In the face of the myriad problems and controversies surrounding disclosure, and its minimal potential for proving effective even if it is implemented, the most appropriate course of action at the present time is to strike the mandatory, pre-discovery disclosure proposal from the pending amendments.

D. Disclosure Is Inconsistent With the Adversary System and the Work Product Doctrine.

[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty³⁸

The adversary nature of civil litigation in this country pervades all aspects of the civil justice system, including discovery. Under present discovery rules, a litigant is responsible for identifying and seeking that information which might be relevant to his case, and an opponent has no obligation to turn over any information unless and until it has been requested. Mandatory, pre-discovery disclosure turns this tradition on its head. It requires counsel to identify that information which might be relevant to facts pleaded in his opponent's complaint or answer, and to voluntarily provide that information to the opponent before it is requested.

Although attorneys are officers of the court, their duty to advance the client's interests is at least equally important. The proposed mandatory, pre-discovery disclosure process would be the first instance in the civil litigation context where the procedural rules would impose an ongoing, affirmative obligation on the attorney to initiate disclosure to an

³⁸ Trial of Queen Caroline 8 (J. Nightengale ed. 1821) quoted in Frankel, The Search for Truth: An Umpireal View, 123 U. Pa. L. Rev. 1031, 1036 (1975).

opponent or the court of information potentially adverse to the client's interests. This is fundamentally unfair to the client, and places the attorney in a particularly problematic position. Moreover, it is a dramatic departure from the adversarial model under which each side must harness its own factual and legal weapons so that the truth will ultimately emerge from the clash of competing positions.

Before the federal rules diminish the adversarial nature of discovery in favor of disclosure, more deliberate study and debate are called for. Such a departure may have systemic implications far beyond its impact on discovery. In fact, it is difficult to rationalize departure from such a fundamental tenet of the civil justice system in favor of an untested process, such as disclosure, when there is no assurance or even evidence that disclosure will eliminate or reduce discovery problems.

Disclosure also is likely to undermine the attorney work product doctrine. Each step of the act of making a judgment as to what might be "relevant" to facts pleaded with "particularity" would be classic attorney work product. Forcing the attorney to then turn that information over to an opponent will inevitably reveal the mental impressions and legal judgments of the attorney making the disclosure. In some instances disclosure may reveal information about the attorney's theory of his own client's case, or may reveal a line of factual inquiry or legal reasoning that the opponent never would have considered on his own. The work product doctrine was intended to protect and promote inventiveness, diligence, and excellence among attorneys. The disclosure process is antithetical to these goals.

**E. Disclosure Undermines The Attorney-Client Privilege and
Injects Ethical Dilemmas Into The Attorney-Client Relationship.**

The attorney-client privilege exists to encourage clients to fully disclose the facts to counsel. The proposed disclosure amendment, however, could damage attorney-client relationships because it requires counsel to disclose to the client's adversary what counsel has learned during his investigation, good or bad, about the client's case. Indeed, the more thorough counsel is and the more information he uncovers, the greater the potential disclosure he must make -- perhaps contrary to his client's interest.

Clients do not and should not expect their own attorney to vigorously search through their files, sometimes finding negative or self-critical information, only to dutifully - and without a request -- turn it over to the client's adversary in litigation. Yet that is what disclosure would require, contrary to the deeply ingrained tradition whereby the attorney protects the client's confidences and the law nurtures the relationship between attorney and client in order to promote candor and trust.

The law traditionally has protected this relationship even at the expense of potentially relevant information which is either kept completely confidential under the attorney-client privilege, or may be used in the litigation subject to stringent protective orders or a court-ordered seal. Although the proposed disclosure process does not modify the attorney-client privilege directly, it will undermine essential aspects of the relationship that the privilege was created to protect and unduly complicate protecting the confidentiality of such information in litigation. Since there is no evidence that disclosure will have a beneficial effect on the pretrial process, and every indication that it will seriously

compromise attorney-client relations, mandatory, pre-discovery disclosure should not be allowed to go into effect.

III. THE PROPOSED DISCLOSURE AMENDMENT IS PREMATURE IN LIGHT OF THE CIVIL JUSTICE REFORM ACT EXPERIMENTS.

When Congress enacted the Civil Justice Reform Act ("CJRA"), it anticipated that the many experimental plans devised by the participating federal district courts would serve as examples of possible reforms for discovery while at the same time yielding empirical data, based on actual practice, regarding which reforms were effective.³⁹ According to a report issued by the Judicial Conference, twenty-one of the 34 "early implementation" federal district courts participating in the experiment have opted to implement pre-discovery disclosure procedures in one of several different forms.⁴⁰ Thus, delaying implementation of disclosure until these experimental plans have produced data as to whether disclosure is even a workable concept would have been an invaluable safeguard of the integrity of the civil justice reform process. In fact, Judge Sam C. Pointer, Jr., Chairman of the Advisory Committee on Civil Rules, recognized the potential value of adopting a wait-and-see attitude when the disclosure amendment initially was deferred, publicly stating that "[i]t makes more

³⁹ See S. Rep. No. 416, 101st Cong., 2d Sess. 2 (1990); 136 Cong. Rec. S17575 (daily ed.) Oct. 27, 1990 (Remarks of Sen. Biden).

⁴⁰ See Judicial Conference of the United States, Civil Justice Reform Act Report: Development and Implementation of Plans By Early Implementation Districts and Pilot Courts 12 (June 1, 1992) ("CJRA Report"). At the time the Advisory Committee first adopted the disclosure concept, it had been briefly in effect in the local rules of only four district courts. See Mullenix, supra note 10, at 798 n.4.

sense to get the benefit of that [CJRA] experience before moving ahead."⁴¹ Mandating disclosure nationwide now, as a permanent amendment to the Federal Rules of Civil Procedure, unduly interferes with the experimentation process now underway in the federal district courts.

The focus on disclosure as the primary means of achieving meaningful discovery reform inappropriately obscures the fact that many other reforms are being considered under the CJRA experimental plans, and other potentially effective discovery reforms are set forth by the Judicial Conference in the pending discovery rules amendments. These latter reforms, in and of themselves, could prove effective at reducing discovery costs and delay. As such, they should be allowed to take effect so that their efficacy can be measured and assessed prior to implementation of a radical discovery reform such as disclosure. If, after experience with the Judicial Conference's discovery reforms other than disclosure, discovery abuse and delay are not diminished, then the best variation of the CJRA experimental disclosure plans could be implemented on a trial basis to test the feasibility of disclosure on a national scale.

⁴¹ Ann Pelham, Irate Litigators Abort Federal Discovery Reforms, American Lawyer News Service, Mar. 23, 1992, reprinted in The Connecticut Law Tribune, page 14 (quoting Judge Sam Pointer, Jr.); see also April 8, 1992 Memorandum of Honorable Ralph K. Winter, supra note 12, at 1-2 ("Most of us continue to believe that a final [disclosure] proposal to be enacted should await experimentation under the Biden Bill.").

**IV. THE PROPOSED DISCOVERY AMENDMENTS OTHER
THAN RULE 26(a)(1) SHOULD BE APPROVED
AND ALLOWED TO GO INTO EFFECT ON SCHEDULE.**

The opposition to mandatory, pre-discovery disclosure vastly overwhelmed the opposition to the remainder of the discovery amendments to such a degree that it would be a responsible exercise of congressional oversight to permit the other discovery reforms to proceed to implementation while withdrawing Rule 26(a)(1) disclosure. Although many concerns were expressed about almost all of the proposed amendments to discovery, all but one concern, the proposed mandatory, pre-discovery disclosure process, can be put aside in the spirit of cooperation and deference to the rulemaking process as established in the Rules Enabling Act. The proposed disclosure process, however, remains so far beyond the pale that it is not possible to abandon objections to it due to the deleterious impact it is likely to have on the civil justice system, and in order, in effect, to protect its opponents' rights of appeal.

Congress should strike Rule 26(a)(1) and allow the balance of the proposed discovery amendments to become effective on December 1, 1993. Indeed, Congress has used this very technique in the past, striking only the objectionable rule or portion of a rule, and allowing the balance of the proposed amendments to go into effect as originally intended. An example of such action occurred in 1974, when Congress severed a number of controversial rules of criminal procedure, allowing only the balance of the proposed amendments to become effective as proposed.⁴²

⁴² See Pub. L. No. 93-361, 88 Stat. 397 (1974).

To withhold the balance of the discovery amendments would unnecessarily denigrate the dedicated work of the Judicial Conference and its committees. Moreover, it would arbitrarily delay implementation of numerous potentially meaningful discovery reform measures. Indeed, although the criticism expressed herein toward disclosure is significant and far-reaching, it in no way should be interpreted as a criticism of the dedicated jurists, academics, and practitioners who serve as part of the Judicial Conference committees, nor as a disparagement of the energy and scholarship behind their efforts. As such, deleting Rule 26(a)(1) is an appropriately limited action that Congress can take while still faithfully carrying out its oversight function.

CONCLUSION

Mandatory, pre-discovery disclosure undoubtedly would have a profound effect on the discovery process and on the adversarial nature of the civil justice system as a whole. What is unknown, however, is whether that effect would be curative, as its proponents hope, or whether it would exacerbate existing costs and delays while causing new problems of its own, as identified herein. Almost all of those who have evaluated and commented on the disclosure proposal strongly oppose it. Further, there is no credible evidence to support the notion that mandatory, pre-discovery disclosure will reduce discovery cost, delay, and abuse.

At a minimum then, mandatory, pre-discovery disclosure should not be implemented nationwide until there is some basis in fact to demonstrate that it is necessary and that it has a realistic potential to cut discovery costs, reduce delay, and minimize abuse. If such information is to ever surface, it may do so once the results of the CJRA experiments

are available. It would therefore be prudent to wait at least until that time before taking any action to implement disclosure.

However, there is reason to believe that mandatory, pre-discovery disclosure could not work in the majority of cases under any circumstances. It deviates too much from the adversary model on which the American system is premised. It is unnecessary in those cases where discovery is not used or is used sparingly – a sizable portion of the total caseload. Disclosure is too amorphous to accommodate the needs of complex litigation without provoking significant satellite activity, another counter-productive result. No tinkering changes and no amount of testing can overcome these substantial hurdles. In the final analysis then, disclosure should be rejected as a well-intentioned, but unworkable concept that will not fit into the federal civil justice system. Congress should strike mandatory, pre-discovery disclosure from the proposed discovery amendments to the Federal Rules of Civil Procedure and allow the balance of the discovery amendments to take effect.

APPENDIX ATEXT OF PROPOSED AMENDMENT TO RULE 26(A)(1)**Rule 26. General Provisions Governing Discovery: Duty of Disclosure**

(a) Required Disclosures: Methods to Discover Additional Matter.

(1) Initial Disclosures. Except to the extent otherwise stipulated or directed by order or local rule, a party shall, without awaiting a discovery request, provide to other parties:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information;

(B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings;

(C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

Unless otherwise stipulated or directed by the court, these disclosures shall be made at or within 10 days after the meeting of the parties under subdivision (f). A party shall make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) Disclosure of Expert Testimony.

* * * * *

APPENDIX BSUMMARY OF GROUNDS OF COMMENTS OPPOSING RULE 26 DISCLOSURE

(comments available as of June 1, 1993)

A total of 264 comments were reviewed to prepare this summary. They addressed the proposed amendment to Federal Rule of Civil Procedure 26 that would require disclosure of information in advance of discovery. Over ninety-five percent of the comments were in opposition to the proposed disclosure process. Ten federal district court judges commented, and eight out of the ten were opposed to disclosure. The following is a summary of the primary objections against the proposal and a tally of the percentage of commenters who raised these objections.

<u>Specific Objections</u>	<u>Percent Commenting</u>
The standard for making disclosure is too vague and ambiguous.	59
A disclosure process will spawn more satellite litigation and disputes.	52
The disclosure process will be unworkable under the notice pleading system.	51
The 30 day time limit for making disclosures after the answer is filed is too short.	45
Empirical data on disclosure is needed from the Biden bill districts before nationwide implementation.	38
Disclosure will result in much unnecessary and burdensome production of documents and information.	25
The disclosure process is inconsistent with the attorney-client relationship and will undermine the work product doctrine.	18
The disclosure process is inconsistent with the adversary system.	17
Simultaneous disclosure places an unfair burden on the defendant.	13

APPENDIX C

**LIST OF SIGNATORIES TO COMMENTS TO THE JUDICIAL
CONFERENCE IN OPPOSITION TO DISCLOSURE SUBMITTED BY
BAR ASSOCIATIONS, BUSINESS ASSOCIATIONS,
CORPORATIONS, PUBLIC INTEREST GROUPS, ATTORNEYS AND JUDGES**

Bar Associations and Business Associations

Alliance of American Insurers	Defense Counsel of Delaware
American Bar Association	Federal Bar Association, Los Angeles Chapter
American Board of Trial Advocates	State Bar of Georgia
American College of Trial Lawyers	Hawaii Defense Lawyers Association
American Corporate Counsel Association	Idaho Association of Defense Counsel
American Institute of Certified Public Accountants	Illinois Association of Defense Trial Counsel
American Insurance Association	International Association of Defense Counsel
Arkansas Association of Defense Counsel	Iowa Defense Counsel Association
Association of American Railroads	Lawyers for Civil Justice
Association of Trial Lawyers of America	Litigation Section of the District of Columbia Bar
Business Roundtable	Los Angeles County Bar Association
State Bar of California	Maritime Law Association of the United States
Central District of California Lawyer Representatives, Ninth Circuit Judicial Conference	Michigan Defense Trial Counsel, Inc.
Chamber of Commerce of the United States	Mississippi Defense Lawyers Association
Chicago Council of Lawyers	State Bar of Montana
Colorado Bar Association	National Association of Independent Insurers
Connecticut Bar Association	National Association of Railroad Trial Counsel
Courts, Lawyers and the Administration of Justice Section of the District of Columbia Bar	New Jersey Defense Association
	New Jersey State Bar Association

New York State Bar Association Commercial
and Federal Litigation Section

Pharmaceutical Manufacturers Association

Philadelphia Bar Association

Product Liability Advisory Council

South Carolina Defense Trial Attorneys' Asso-
ciation

Trial Lawyers for Public Justice

Virginia Association of Defense Attorneys

Washington Defense Trial Lawyers

Washington State Trial Lawyers Association

Wichita (Kansas) Bar Association

Public Interest Groups

Alliance for Justice

American Civil Liberties Union

NAACP, Legal Defense and Educational Fund

Public Citizen Litigation Group

Corporations

American Standard Inc.

Amoco Corporation

ARCO

Bausch & Lomb Inc.

Bethlehem Steel Corporation

Bridgestone/Firestone, Inc.

Caterpillar, Inc.

Chesapeake Corporation

The Clorox Company

The Coca-Cola Company

Control Data

Corning Inc.

Cooper Tire & Rubber Company	Mead
Deere & Company	Melroe Company
The Dow Chemical Company	Michelin Tire Corporation
Duquesne Light Company	Mobil Corporation
E.I. DuPont de Nemours and Company	Morgan Stanley & Co.
Eastman Kodak Company	Morton International
Emerson Electric Co.	Murphy Oil USA, Inc.
E-Systems, Inc.	Nalco Chemical Company
FINA, Inc.	Nissan North America, Inc.
Ford Motor Company	Olin Corporation
Gates Energy Products	Oryx
GenCorp	Otis Elevator (United Technologies)
General Motors	Phelps Dodge Corporation
Georgia-Pacific Corporation	Piper Aircraft Corporation
Harley-Davidson, Inc.	The Procter & Gamble Company
Harris Corporation	Ralston Purina Company
Hershey Foods	Raytheon
Hughes Aircraft Company	Sears, Roebuck and Co.
Joy Technologies, Inc.	The Sherwin-Williams Company
Lone Star Technologies	Snap-On Tools
LTV Steel Company	Sundstrand Corporation
Mazda Motor of America, Inc.	Tenneco Inc.
McDermott, Inc.	The Timken Company
McGraw-Hill, Inc.	TRW Inc.

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The Uniroyal Goodrich Company

USX

Waltco Truck Equipment Co.

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- Patrick J. Hagan, Kincaid, Gianunzio, Caudle & Hubert
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- Allen W. Howell, Shinbaum, Thiemonge & Howell
- Hunton & Williams
- Chester A. Janiak, Burns & Levinson
- Hon. James H. Jarvis II, United States District Court, Eastern District of Tennessee
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**STATEMENT OF JOHN J. HIGGINS, SENIOR VICE PRESIDENT
AND GENERAL COUNSEL, HUGHES AIRCRAFT CO.**

Mr. HIGGINS. Good afternoon, Mr. Chairman. Mr. Chairman, members of the panel. I thank you for your patience. I realize I am next to last. I shall be brief and hopefully informative.

I have been practicing law for almost 35 years.

Mr. HUGHES. Could you bring the mike a little closer, Mr. Higgins?

Mr. HIGGINS. I have practiced law for almost 35 years, 23 in the Federal courts in New York, 7 in the Federal courts in Michigan and currently I am in my fifth year of practice in California.

One of the distinguished judges this morning mentioned the laudable purpose of Federal rule 1, which is the just, speedy and inexpensive resolution of litigation. My chairman has obviously never read rule 1. I hear that from him every week.

Our outside counsel budget for last year was approximately \$44 million; and most of that \$44 million went toward the litigation of discovery issues or complying with those issues.

It is in that context that I would like you to place my remarks which are basically some practical insights, as I see it, from my own company's perspective.

We endorse virtually all of the changes in the discovery rules with, of course, the exception of 26(a)(1). We, too, join and request that 26(a)(1) be deleted.

We are a worldwide company. Our problem with mandatory pre-trial disclosure is that we are going to have to, within 75 or 90 days, identify individuals and documents that fall within that disclosure obligation; find their present physical location; and provide the required disclosures within that framework.

But our more serious concerns are in the area of our government contract work. Many of our documents and records are subject to extensive national security requirements.

Much of the information will not be discloseable at all; or if it is, it will have to be disclosed pursuant to a protective order, so you are going to get judicial intervention early and up front, that additional layer of expense, time, disruption of which speakers have referred to today.

The Government also may need to be consulted in many if not most of the cases involving classified information; and that will increase the complexity of the handling of the issues and the time needed to resolve them.

There will be a massive amount of paperwork involved and that presents the risk—and I think it may be a significant risk—that classified information may end up being disclosed inadvertently.

We also have extensive government paperwork and record-keeping requirements; and that increases the volume of potentially early discloseable material, making document identification, location, and production complex and time consuming.

We, of course, also have oversight by government personnel and consultants; and that increases the number of individuals who may be knowledgeable about a particular lawsuit and whose identity will have to be determined and disclosed.

We also have a problem with our proprietary information. The nature of our litigation profile will precipitate significant conflicts and, in my opinion, pose competitive risks if disclosure becomes effective.

We are involved in litigation with competitors where confidential proprietary information is at issue. Disclosure is not sensitive to the risks inherent in such litigation, where even protective orders are insufficient.

Even in litigation against noncompetitors, proprietary information could be inadvertently disclosed to competitors who will monitor the litigation with much greater ease than under present day discovery rules.

Under mandatory disclosure, you will be put into the position of being forced to seek court involvement and protection even in advance of disclosure which will increase contentiousness among the parties and perhaps incurring discovery sanctions from the court.

If I may sum up, I think that my approximately \$44 million last year hopefully will be reduced by some of the reforms that are posed in the other rules. I am afraid that I must say that based upon my experience, that \$44 million will be increased if rule 26(a)(1) goes into effect. Therefore, I join Mr. Cortese and the committees he represents requesting that it be deleted.

Mr. HUGHES. Thank you, Mr. Higgins.

[The prepared statement of Mr. Higgins follows:]

PREPARED STATEMENT OF JOHN J. HIGGINS, SENIOR VICE
PRESIDENT AND GENERAL COUNSEL, HUGHES AIRCRAFT CO.

- I. The nature of Hughes' business will make compliance with mandatory, pre-discovery disclosure difficult, if not impossible, in most litigation.
 - A. Hughes facilities, and thus, its employees, consultants, and records are dispersed widely throughout the U.S., Europe, and Asia, posing significant logistical problems, such as:
 1. Initially identifying the individuals and documents that may fall within the disclosure obligation;
 2. Finding the present physical location of identified, responsive individuals and documents; and
 3. Providing the required disclosures within the requisite disclosure timeframe.
 - B. Hughes' government contract work creates unusual circumstances that will compound the difficulties Hughes may have in complying with disclosure:
 1. Many Hughes' documents and records are subject to extensive national security requirements.
 - a. Much information will not be disclosable at all, or if it is, it must be disclosed pursuant to a protective order. In either case pre-disclosure involvement by the court will be necessary, negating any potential benefit from disclosure.
 - b. The government may need to be consulted in many, if not most cases involving classified information, increasing the complexity of the issues and the time needed to resolve them.
 - c. Due to the massive volume of paper involved and the short time constraints of disclosure, the risk that classified

information will be disclosed inadvertently will be significantly increased under disclosure.

2. Government paperwork requirements and audit trails increase the volume of potentially disclosable material exponentially, making document identification, location, and production complex and time-consuming.
3. Oversight by government personnel and consultants increase the number of individuals who may be knowledgeable about any particular issue, and whose involvement therefore must be considered as part of the disclosure obligation.

II. The nature of Hughes' litigation profile, coupled with the small circle of Hughes' competitors, will precipitate significant conflicts and pose competitive risks if disclosure becomes effective.

- A. Hughes' is involved in litigation against competitors where confidential proprietary information is at issue. Disclosure is not sensitive to the risks inherent in such litigation, where even protective orders often are insufficient.
- B. Even in litigation against non-competitors, proprietary information could inadvertently be disclosed to competitors monitoring the litigation with much greater ease than under present day discovery.
- C. Under disclosure, Hughes will be put in the awkward position of being forced to seek court involvement and protection even in advance of disclosure, increasing contentiousness among the parties and perhaps incurring discovery from the court.

III. Conclusion

For the above reasons, Hughes fully supports the statement submitted on behalf of the Business Roundtable Lawyers Committee, the Chamber of Commerce of the United States, the National Association of Manufacturers, the American Association of Railroads, the American Automobile Manufacturers Association, the American Bankers Association, the Product Liability Advisory Council, Inc., the Defense Research Institute, the Federation of Insurance and Corporate Counsel, the International Association of Defense Counsel, and Lawyers for Civil Justice, and respectfully requests that Congress strike the disclosure amendments contained in proposed new Rule 26(a)(1).

Mr. HUGHES. Mr. Frazza.

**STATEMENT OF GEORGE S. FRAZZA, VICE PRESIDENT AND
GENERAL COUNSEL, JOHNSON & JOHNSON**

Mr. FRAZZA. The Bible says the last shall be first.

I find myself being similar to Mr. Dunlap in two ways and dissimilar in two other ways. Like his client, Johnson & Johnson's very existence is in intellectual property and research and development. We spent over \$1 billion on it last year.

Unlike Mr. Dunlap, a lot of that was in New Jersey. The second thing is both Mr. Dunlap and I just rankle at the excessive time and waste of the discovery system in the Federal courts. We are involved in a wide range of litigations. Some are very complex. Some are simply straightforward.

I didn't spend \$50 million, but let's say I spent tens of millions in the court system in the United States; and a great amount of that is spent on discovery which in my view is just wasteful.

I would be the first to embrace the modifications of rule 26 if I thought that that was going to ameliorate that situation in any significant degree. I think the opposite; however, I think it will aggravate it.

What it will do is that it will present an opportunity for potential abuse to people who will try to devise very elaborate complaints, disputed facts alleged with particularity in an effort to scoop out of our files virtually anything that they think can support that.

And on the other hand, the adversary—having this sword over his head—is predictably going to respond with a massive pleading which also bristles with "particularized factual allegations."

What will you have then? You will have disputes over whether facts were alleged with particularity, over what is relevant to disputed facts, over work product, attorney-client privilege, over whether the documents were properly categorized as the rule says. You will categorize the documents if you don't put them over.

This whole layer of disputes will be laid on the major problem of litigation in the Federal courts and I think everybody agrees and that is the propensity of so-called litigation lawyers—and I use that as opposed to trial lawyers—these are people that love to depose and take interrogatories but do not want to march up the courthouse steps. The propensity of those people to continually expand the discovery—and I might say with sometimes the acquiescence of the magistrates and the judges who are either preoccupied with the criminal docket or simply from a philosophical basis think you have a right to get every fact that might help you regardless of the costs involved or regardless of the value.

I see this as being just another layer that is not going to do anything to solve the major problem. And the major problem is the enormous waste of public and private resources that are tied up in the discovery process in the U.S. courts.

I underscore what my colleagues have said to that. There are a lot of answers to that: Closer supervision by the trial judge; not a bias toward excluding evidence but a bias toward looking someone in the eye and saying do you really have to take these depositions? And I applaud the limitations on depositions, and I applaud the limitations on interrogatories.

In fact, like my colleagues, again, all of the proposed changes with the exception of the changes in rule 26, we heartily endorse. We think they are a step; but I don't think this helps. I think it hurts. I think the only thing that you can do to speed up the process is a firm trial date which some districts have done—the rocket docket in Virginia and others; and the intervention of the judge and the magistrate to take this discovery monster by the throat and put some common sense into the litigants to get the case to trial.

Unfortunately, I don't think this proposal does that. I think it does just the opposite.

Thank you.

[The prepared statement of Mr. Frazza follows:]

PREPARED STATEMENT OF GEORGE S. FRAZZA, VICE PRESIDENT AND GENERAL COUNSEL, JOHNSON & JOHNSON

For over fifteen years I have been General Counsel for Johnson & Johnson, one of the largest health care companies in the world and in this country. It has over 160 independent operating subsidiaries which work on an autonomous basis and cover a vast array of specific specialized fields in the health care area. The advances in medical devices and drugs inevitably generate a wide array of disputes in the field of intellectual property as well as in the area of drug and device product liability. These disputes range from relatively straightforward, uncomplicated ones such as trademark disputes to very complex ones concerning the existence and the scope of rights under technology licensing agreements and patents covering emerging technology.

Because Johnson & Johnson is in such an extensive variety of fields, many of which are on the cutting edge, we are heavily engaged in such disputes. Our annual budget for legal costs, both for in-house and outside litigation counsel run into the tens of millions of dollars—much of it, I am sorry to say, is devoted to pretrial discovery in federal courts, and much of that pretrial discovery, I am even more saddened to say, is essentially a waste of time and money.

That is why I appreciate being given the opportunity to appear before this subcommittee and offer my reasons as to why the proposed changes in Rule 26 relating to automatic disclosure at the outset of a civil action should not be approved. I might also add that virtually every general counsel of major industrial corporations with whom I have talked generally share my views as to the undesirability of this mandatory automatic disclosure provision.

What the enactment of these proposed automatic, confessional types of disclosure rules would, in my judgment, produce is a result diametrically opposite to the broad objective of the Advisory Committee, namely, to contain the scope and costs of discovery in complex litigation, both financial as well as in terms of the judicial and professional labor involved. These proposed rules would make simple cases complex and convert complex cases into Kafkaesque nightmares.

The simple cases, and there are many in the federal courts, are either settled or disposed of with little or no discovery. There is just no need for the complex launching apparatus that these proposed automatic disclosure rules present. Not all rockets require a three-story gantry of the dimensions used at Cape Canaveral to be launched.

The Administrative Office of the U.S. Courts has the raw empirical data relating to the number of relatively simple cases. They far outnumber complex ones. The Advisory Committee, as far as I am aware, has offered no explanation as to why these cumbersome, intensely convoluted automatic discovery procedures, interwoven with the sanctions, are necessary or beneficial for the handling of such disputes. Inherent in these automatic disclosure rules is the potential for abuse presented to attorneys who want to bludgeon an excessive settlement at the outset of the litigation. Such an attorney can file a prolix, factually complicated pleading, thereby triggering the "disputed facts alleged with particularity in the pleadings," mechanism set forth in Rule 26. Having done so, that attorney has thereby placed his adversary under an immense draconian sword and predictably that adversary will respond in kind with a massive pleading likewise bristling with particularized factual allegations.

The argument can and has been made that there are safeguards to prevent such abuses, but that may or may not be sufficient with respect to the particular case. The general disposition of trial judges and magistrates in the federal system, how-

ever, is to permit discovery as long as it is in some way arguably tangential to the dispute. There is no reason to assume that this attitude will miraculously and spontaneously be changed with the advent of this automatic disclosure rule.

Even complex cases are often settled relatively quickly and without the need for extensive discovery. With regard to those that cannot be settled, the imposition of the automatic disclosure process in the proposed Rule 26 will add one more layer onto the discovery process creating expansive and burdensome satellite litigation, endless disputes about work product and attorney-client privilege as well as resurrecting pleading motions reminiscent of the old days of case pleading bills in equity.

This revolutionary solution proposed by the Advisory Committee will aggravate the problem which vexes everyone concerned either with defraying the expense of complex litigation or administering and managing it. That problem is discovery-run-wild. In proposing yet another layer of discovery and making it mandatory, the Committee has failed to appreciate the point that discovery is a variant of Parkinson's Law. Discovery in complex litigation almost invariably fills up the time allowed for discovery and the capacity or will of the respective clients to pay for it. As has been observed on many occasions by those observing the process, discovery in complex cases has spawned a whole new breed of lawyers so-called "litigation lawyers." For these lawyers there will always be one more round of depositions, one more round of document production, one more round of interrogatories, either to object to, move against or compel answers on.

The Advisory Committee assumed, somewhat naively I submit, that this drive for discovery of mammoth proportions, could be contained by getting as much information as possible out on the table at the outset of the litigation. In theory, this approach sounds eminently reasonable. In practice, it will not work because it does not get at the bottom of the problem.

What the litigation lawyers have done is to seize upon the objective that was built into the Federal Rules of Civil Procedure with respect to discovery. That objective was to get all the information relevant to the action out on the table by means of discovery and thereby avoid surprise at a trial. What the litigation lawyers have done is to take the fishing expedition license incorporated in Rule 26(b)(1), that all matters are discoverable if "the information sought appears reasonably calculated to lead to the discovery of admissible evidence" and use that license as the wedge to enlarge the scope of discovery beyond all rational or economically sound proportions. Most of these litigation lawyers do so in good faith, namely, to protect themselves from the horrid spectre of "surprise" at trial.

Thus far, the judiciary, both trial judges and magistrates, have blindly accepted the soundness of that objective. The blind acceptance of this objective, however, has an inevitable side affect: there are no realistic bounds really put on discovery. Discovery is not a finite road with a discreet recognizable end point. Rather, it is a circle which, driven by litigation lawyers, gets increasingly expanded until arbitrarily cut off, either by time restraints or restraints on costs.

With this license, aggressive lawyers can make even simple cases immensely burdensome. For instance, we recently had a simple trade dress case with a competitor in which the attorneys' fees for each side exceeded a million dollars. In discovery, the parties turned over tens of thousands of pages of documents, provided many pages of proposed ad copy and surveys of consumer perceptions, exchanged numerous package design mock-ups and pill prototypes, and produced twenty years worth of analgesic labelling. Documents were also subpoenaed from numerous third parties. The parties propounded, answered and objected to multiple sets of interrogatories. The parties took over fifteen depositions, several of which took two to three days and most of which went well beyond the normal work day. The attorney time required to engage in this discovery was enormous, but when all was said and done, the briefs in the appeals court revealed the issues to be simple and straightforward.

What needs to be done to contain discovery-run-rampant in complex litigation in the federal system is a recognition that the objective of discovering all information "reasonably calculated to lead to the discovery of admissible evidence" is not an unquestionably and unarguably valid objective to be achieved regardless of rational cost and time constraints. On the contrary, the excessive discovery abuses, although admittedly done in good faith in order to avoid surprise, basically show that even attempting to attain this objective is inherently wasteful and unsound and is, in the final analysis, the root cause of the problem.

In other areas, the Advisory Committee's proposed amendments appear to recognize this. Its proposal limiting the number of interrogatories, including subdivisions has worked very well in many district courts, and I believe is inherently sound. So is their imposition of limits on the number of fact depositions.

In this connection, it is worth noting that, the 1983 amendment to Rule 11 whose purpose was to "put teeth" in the Rule and thereby break or restrain excessive zeal

in discovery and restrain taking unfounded or unwarranted positions in litigation, proved counterproductive and spawned satellite litigation. There is every reason to believe the present proposed Rule 26 amendments will likewise spawn satellite litigation. Strict limits on discovery, as I have stated above, should help to lighten the massive burden of pretrial discovery that afflicts complex cases, but is at best only a mild palliative. The best terminator of discovery-run-rampant is a firm trial date. That tactic we know works. It usually produces a settlement and, if not, facilitates a quick disposition of the case.

On the other hand, the assumption that the proposed mandatory automatic disclosure will result in curtailing discovery is based on pure speculation. There have been no experiments in any of the district courts with mandatory formal automatic disclosure. For the reasons set forth above, I believe the assumption is unsound, but in any event, such a revolutionary, potentially devastating change should not be made without testing to see if it does work.

Mr. HUGHES. Since the advent of the Civil Justice Reform Act, Mr. Frazza, 23 of 41 programs have incorporated some form of mandatory disclosure. Isn't that evidence that disclosure up front is a way we will proceed?

Mr. FRAZZA. Well, some form of mandatory disclosure, the words "some form" is mandatory disclosure in some courts throughout the system; but normally, it is not, not normally. I know of no instance where it is a blanket, open-ended obligation that you should look into your opponent's mind, look at his complaint, and try to divine what his cause of action is and what the gist of his complaint is and find every document or categorize every document relevant to that.

I have not been personally exposed to any of those situations where we have been involved in mandatory disclosure so I cannot talk to that. Maybe some of the other people on the panel can.

I have no problem with mandatory disclosure if it is applied in a particular case where it is tailored to that case. In fact, many of the cases in the Federal courts are relatively simple cases and go on and are settled without the judge ever intervening or with very little discovery to take place. Putting this layer on there makes that simple case into a complicated one often.

So I have no problem with mandatory disclosure applied in particular cases by a judge who is in control of that process.

Mr. HUGHES. How much of your concern is that perhaps it will spark a fishing expedition; that it will, in fact, evolve into a cause of action that they may not have known they had?

Mr. FRAZZA. To be very frank, with notice pleading, you can go on a fishing expedition, too. You can use section 26.

Mr. HUGHES. That was my second question.

Mr. FRAZZA. You can use rule 26 now to go on a fishing expedition. The courts often allow you to do that.

The difference is that you have to, at least, detail what documents you are looking for; and as a defendant—as a plaintiff, I have to detail. You as a defendant have to decide, (a) whether those documents are responsive, whether you have documents responsive to do; and (b) whether they should be produced if not for work product, kept out of work product or something. You are not up there in the clouds somewhere. Anything that bears on this complaint, give me. It is Kafkaland.

Mr. HUGHES. Isn't it true, Mr. Cortese, Mr. Higgins, that that occurs anyway?

Mr. Higgins, you indicate the concern about proprietary information. You are also concerned about all kinds of privileged information. That is a problem under the present procedures, is it not?

Mr. HIGGINS. Yes, it is but it is not compounded by a mandatory disclosure requirement.

Mr. HUGHES. The difficulty that I think that we have to wrestle with is the fact that much of the information that you would rather not give initially, you ultimately have to give. If they ask the right question and make a specific enough request, they get the information.

That often comes after a year of discovery, after interrogatories have been propounded, and numerous depositions. That is precisely what I believe the purpose of mandatory disclosure is, to try to get information you are going to have to disclose anyway and eliminate the costly, time-consuming aspect of it. This combined with the face-to-face meetings early on among counsel and a session with the judge who becomes familiar with the case up front.

What is so wrong with that?

Mr. HIGGINS. Well, I think that all of the relevant information coming out under the present system, at least as far as the way I handle litigation, I mean there is just no future for me to draw out litigation and incur substantial expense about items I know sooner or later I am going to have to produce.

Mr. HUGHES. Mr. Higgins, as counsel for Hughes Aircraft, I would bet that you respond to the questions you are asked; but if your adversary is not smart enough to ask the right questions, you won't supply him with the additional answers, would you help him get smart in the process?

Mr. HIGGINS. A fair question demands a fair answer in the law.

Mr. HUGHES. Understandably. If you do not adopt that practice at the present time, then you might find yourself with another job or if you were a practicing attorney, at the end of an ethics complaint. That is precisely what we are trying to get at. I think there are some legitimate concerns; but, you know, the suggestion that you might disclose proprietary information, that is a problem with the present rules. You need protective orders. That is the subject, I am sure, of endless motions under present procedures.

Mr. HIGGINS. We are not faced with a mandatory requirement up front. If a suit is broad and it involved proprietary information, you know you are going to have to produce it. Inevitably you can work out with your adversary a stipulated protective order that the judge will sign that didn't involve judicial intervention. Here you are adding a layer of judicial intervention and motion practice that currently doesn't exist.

Mr. HUGHES. Your argument is, it is not going to result in less costs because it is going to generate more motion practice; I presume that is the bottom line?

Mr. Toll, in your statement you refer to a hypothetical situation where a client reveals information to his attorney during a break while taking a deposition. In your hypothetical, the attorney is required under the disclosure statute to reveal that to the adversary. Doesn't rule 26(b)(5) provide adequate protection for privileged information?

Mr. TOLL. Well, I think in the hypothetical, Mr. Chairman, it refers to a situation regarding similar claims or accidents or the like, in a situation where the question wasn't even asked for in a deposition.

The way I see the 26(a)(1) disclosure requirement, is it consistent with that attorney-client privilege? I am not necessarily confident I could rely on attorney-client where I have the overriding consideration of disclosure with things that are relevant.

In that hypothetical, in a deposition situation, where you are dealing with, I think, an accident, to use what Mr. Bruno was referring to, similar accidents or claims or the like would clearly be relevant and something that may ultimately be discoverable. But the rub is it is not asked for.

It wasn't asked for in the hypothetical by the questioner and probably wasn't asked for in the interrogatories prior to the deposition. I have a real problem with that mandatory disclosure where I have to give that information up right away in the absence of a request for it.

Mr. HUGHES. So you would have concerns with proposed rule 26(a) anyway even if we could satisfy your concern about what in essence is pleadings with particularity?

Mr. TOLL. I have a legitimate concern with having to make a disclosure at the outset of litigation without a request for that information. It is not the way as a lawyer I was trained. It was based on an adversary system which I think ultimately is a good system. I just have a philosophical problem; and I think, if enacted, a real problem with coming to grips with that disclosure requirement.

Mr. HUGHES. Mr. Dunlap, I presume some of the data you supplied relative to the Arizona experience, is created because of the additional motion practice generated by that?

Mr. DUNLAP. I didn't submit that.

Mr. HUGHES. OK. That was the last panel. I am sorry. You were in Texas and California. They go further in Texas, don't they? They substitute disclosure for document requests. You are not supposed to need document requests.

Mr. DUNLAP. They require more information to be disclosed up front than 26(a)(1) does.

Mr. HUGHES. I see.

Mr. CORTESE. If I may comment on that, Mr. Dunlap put his finger on a real problem with this version of disclosure in the new amendments, because the original Brazil-Schwarzer concept of disclosure was that it replace discovery, not that it be added as an additional layer on discovery. That is where we have a real problem with it, because it just gives another layer you have to go through and deal with; and obviously it causes the problems that Mr. Toll spoke to.

Mr. HUGHES. Is the present criteria used for 26(a) better or worse today? At one time the criteria was "likely to bear significantly on any disputed claim or defense."

Mr. CORTESE. It is still the same, Mr. Chairman. The general standard as to the scope of discovery has remained the same. It has been interpreted perhaps more broadly, so that basically anything must be turned over originally.

Mr. HUGHES. I see.

Thank you. The gentleman from New Mexico.

Mr. SCHIFF. Thank you, Mr. Chairman. I would like to stay on the subject, Mr. Chairman. I think we are at the crux of the proposed change in rule 26(a).

As I understood our first panel of judges, who were the proponents of this change, they suggested the information that we be provided by this disclosure at the beginning of the case is in essence information that has to be provided anyway and would be provided anyway; so let's just eliminate useless steps in the discovery process and get right to it.

Mr. Toll has raised the point in the adversarial system, I think I should be asked for the document. I think that that is the heart of the matter. Aren't the plaintiff's attorneys adept enough at their trade that they are able under present rule 26(a) to frame a request in the context of they are going to get everything anyway?

If the answer to that is yes, then I think the proponents of the change have a point. If the answer to that is no, then I think the objections have a point in that you might be disclosing things that the adversaries never thought of asking for.

I will open that up.

Mr. TOLL. If I may, Mr. Schiff, based upon my experience, the answer to that question is it depends upon the lawyer. I represent, for example, the casino industry. In many instances there is documentation that I have which arguably would be protected under some privilege, but which may be relevant and perhaps discoverable depending upon the nature of the particular document and the like.

My experience is that the plaintiff's attorneys that I come in contact with, a lot of them do not do their homework; and the situation arises in many instances where I am not called upon to give out that type of information.

The real problem that I have is how do I go back to my client under the proposed change and say the protections that were afforded to you under the previous system may no longer be afforded to you? We may have to disclose documents that we may not have had to disclose in the absence of a request for it.

So the real concern that I have is the erosion of what is from the defense point of view, a critical, critical shield, that is attorney-client and attorney work product.

Mr. SCHIFF. Under the proposed rule, if I may follow up on that, would you have a right to go in and seek a protective order on the grounds of I have something that may be relevant but it is privileged under some rule?

Mr. TOLL. I would suspect I would have that opportunity. Again, if my adversary isn't adept enough at knowing what he should be asking, what I am doing is I am having my client pay for me to educate my adversary; and in the context of that dispute in litigation; and, after all, I think we have to be mindful of the fact that once the litigation starts, it is an adversarial process. You are there to win. You are there to—if you are on the fence, either win outright or minimize your exposure.

By introducing this type of disclosure requirement, you are, in essence, eviscerating what is a very, very critical weapon that the defense has.

Mr. FRAZZA. May I add under the present practice, you have notice pleading. When the discovery process gets underway, it is the plaintiff's obligation to determine what are the disputed facts and what evidence does he need to prove his case.

Under this particular situation, we have to decide from a very prolix pleading perhaps what are the disputed facts.

Mr. SCHIFF. You have to determine from the complaint what the complainant wants?

Mr. FRAZZA. That is right. Mr. Chairman, you are right. A lot of these controversies do arise in the context of rule 34 motions and rule 26 motions. The difference is you have a mooring. You have a specific request where someone says all documents that relate or refer to this particular Patent Office proceeding, et cetera.

We then come in and say that is much too broad. There are 13 carloads of documents, try to hammer it out. We hammer it out with either the magistrate, the judge, or ourselves generally.

That is where issue is joined. Issue will still be joined on this, under the same types of arguments you will have; and the answer to it is limitation on the time; in other words, limitation on the amount of depositions, limitation on the time; and somebody saying you are going to finish this by June 1.

Now, if you guys cannot work it out, I will work it out for you, but June 1, discovery shuts down. You have 6 months, 3 months, or 2 months in this case to do it. That is the way you move the process forward. Not by drafting another potential technical argument over—I said categories. We are supposed to say, provide them with the categories of documents. What is the definition of category?

I would say it is very, very broad. All our NDA's; in other words, if somebody says you have made a pattern of not divulging to the FDA certain side effects of your drugs in the last 5 years and puts that in the complaint, and I say I am supposed to give him something that—what do I do? I say all right, every FDA-NDA new drug application we ever filed, that is about 70 carloads of documents.

It might be the disputed facts are in there. Take a look at them. He will say are you kidding, I want something more particular. What do you want more particular? You want cardiac drugs? We are back in the same thing again.

I say it is his obligation to say this is what I want. Give it to me. And I say no or yes. And then the judge or the magistrate decides. We get on with it within a time constraint. That is the answer to this problem.

Mr. SCHIFF. If I may, under the proposed rule, you can even be giving the plaintiff's attorney a theory he didn't even think of?

Mr. FRAZZA. Perhaps. But I will not give it to him easily, obviously. The point about being an advocate, the chairman's comments about I wouldn't have a job. I am not going to say—you might look in 1937, there was an article filed that said side effect wasn't—it is on page 16; I think I remember, isn't it back there somewhere? I will not have somebody say go back and look at it. I will say, this is hypothetical, of course, it has never arisen, I am going to say to the NDA's. And the judge is going to say wait a minute, that is not enough. Well, what is enough, Your Honor?

Mr. DUNLAP. I would answer that question——

Mr. SCHIFF. I yield back.

Mr. HUGHES. Doesn't the question of whether or not it was pleaded with particularity come into play? If it has not been pleaded with particularity, then you have no guidance.

Mr. FRAZZA. That is correct. That is correct.

Mr. HUGHES. You don't have to respond?

Mr. FRAZZA. That is correct.

Mr. HUGHES. That is how I understand the proposal.

Mr. FRAZZA. That is correct. There will be arguments whether it is or isn't.

Mr. HUGHES. That is what I said earlier. There will be arguments as to the disputed facts. I understand the concern. What you think is disputed may be vastly different from what your adversary thinks are disputed facts.

Mr. FRAZZA. That will take the time of the court and us, too.

Mr. HUGHES. The gentleman from California.

Mr. EDWARDS. Thank you, Mr. Chairman.

As I understand it, plaintiffs' lawyers would benefit from this change; defense lawyers representing firms being sued would be disadvantaged; is that correct?

Mr. CORTESE. Mr. Edwards, I should point out the Association of Trial Lawyers of America, the major plaintiffs' association, is on record opposing the form of disclosure that was published for comment.

And a number of organizations, consumer oriented organizations, are also on record opposing.

Mr. EDWARDS. Who is for this?

Mr. CORTESE. Apparently the judges and perhaps one or two other individual practitioners. We can't find anybody that is really for it.

Mr. EDWARDS. The Association of Trial Lawyers of America, their association, is it in favor of this change?

Mr. CORTESE. No. My understanding is they have not yet taken a position with respect to the current version of 26(a)(1). But I can tell you specifically that they filed comments opposing the earlier version that was published for comment previously. That is one of the problems we have here. The committee changed its mind.

First, it published one formulation for comment. Then it decided to withdraw that and authorize the courts to experiment under the Civil Justice Reform Act. Then it changed its mind again at the next meeting. They said let's have a different formulation which was, I thought, a slightly improved formulation of the same flawed concept and will recommend that be adopted by the Supreme Court.

That is what your committee now has before it. And it was in that process with respect primarily to the original published proposal that many people took a position. Now they are in the process of taking positions with respect to the current one; but you cannot conclude on that record that the plaintiffs are for it and the defendants are against it. Because as far as I can tell, all the customers are opposed to it. It is only the judges that think, well, let's try it.

Mr. EDWARDS. If your practice consisted of suing big companies, which apparently some lawyers do most of the time, wouldn't you be in favor of it?

Mr. CORTESE. Should you be in favor of it?

Mr. EDWARDS. Wouldn't you just actually be in favor of it? It will make your job a lot easier?

Mr. CORTESE. No. No. It wouldn't. It would make my job more complicated for the reasons Mr. Higgins and Mr. Frazza pointed out and the evidence we have in the record from Maricopa County and from the examples I cited to the committee.

It is another layer that unduly complicates the process. It will not save any time. It is this one-size-fits-all approach to litigation. In those cases, and I have cited evidence of some very recent yet unpublished studies that there isn't a discovery problem in perhaps 60 percent of the cases because there either is no discovery or the cases are so simple that there are no discovery problems.

It is in the cases where we have a discovery problem that we feel—and we feel very strongly—disclosure is going to add to those problems.

So my sense of it is that disclosure is really a solution chasing a problem because it will not solve problems in the cases where we really need to solve problems. It is going to add to them.

Mr. FRAZZA. Also, most lawyers know cases are settled on the courthouse steps. The overwhelming number of cases brought against Johnson & Johnson by plaintiffs, be they product liability cases or whatever, those lawyers are not the ones that engage in this discovery I was wailing about. They know that the time a case settles is when you are walking up the steps. You go into the judge's office; he says if you cannot settle this, we start picking a jury at 10 a.m. The overwhelming amount of plaintiffs' lawyers as you think of them—some represent plaintiffs and defendants—are well aware of that fact.

Time is on your side as the defendant. They want to get it into the courthouse and try the case there; not litigation lawyers as I said. They are trial lawyers.

Mr. EDWARDS. Would you be in favor of an amendment that would put time limitations on this process?

Mr. FRAZZA. Absolutely.

Mr. EDWARDS. You would?

Mr. FRAZZA. I would be afraid of a general amendment; but I would be in favor of an amendment that would give the trial judge broad discretion to put time limits on discovery. The problem is that it takes so long to get to trial in so many cases that the judges don't care, and the discovery fills up the vacuum until the judge deals with it. I would be in favor of a provision that would say all discovery will be through by x date.

Mr. EDWARDS. Would you all be in favor of something like that?

Mr. DUNLAP. Speaking for Intel and the experiences we have had like in the ITC where there are time limits, those are very helpful. I think that the problem is that they may need to be different in different cases. Right now, we rely on the judges to enforce a time limit of some kind. So helpful guidance on, you know, intellectual property cases in a certain amount of time.

I would also like to respond to the neutrality question, because Intel is on both sides. We are defendants in lawsuits. I think that these rules are neutral. I don't think they particularly help a plaintiff or a defendant. Maybe the problem is this hypothetical of the dumb attorney on the other side. I haven't experienced that hypothetical. I mean I have always had in the Federal court cases here, we have had attorneys on the other side that knew the questions to ask; and the type of information that is going to be disclosed is going to be attained one way or the other.

In the worst case, it takes the other side an extra set of document requests. So instead of wasting three sets of papers, you waste less paper. The type of information that I believe is intended to be disclosed is the kind of information that is clearly the core of the case.

Mr. EDWARDS. Thank you.

Thank you, Mr. Chairman.

Mr. HUGHES. Well, the panel has been very, very helpful to us.

I don't think there is any question but that we could free up more judge time early on by a disclosure process. They are bogged down with criminal cases in most instances. We could settle a case a lot sooner because not only do plaintiffs' attorneys wait, defense attorneys also wait until that jury is about to be empaneled. They also know that they have time.

Unfortunately, part of the problem is that judges often do not focus in on a case until after discovery. It goes on, and on, and on, sometimes for years. I have had personal experiences with that. That is a big part of the problem.

So rule 16 which gets the judges in early is a step in the right direction. I assume all of you agree with that.

Getting the parties together early on in the process, you all agree with that?

The same thing with adversaries. They often begin to focus in when they pick up the file ready for trial because the discovery is often done by some other young lawyer in the office rather than the one that is going to try the case or make the decision. He hasn't focused in on the case.

Well, you have given us a lot to think about today. We appreciate the time you have given us and your patience.

We thank you very much. That completes the hearing for today. The subcommittee stands adjourned.

[Whereupon, at 3 p.m., the subcommittee adjourned, to reconvene subject to the call of the Chair.]

APPENDIXES

APPENDIX 1.—STATEMENT OF HON. BILL MCCOLLUM, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

I WOULD LIKE TO MAKE A STATEMENT FOR THE RECORD REGARDING THE PROPOSED CHANGE TO RULE 30(b)(4) OF THE FEDERAL RULES OF CIVIL PROCEDURE. IN MARCH OF THIS YEAR I WROTE A LETTER TO CHIEF JUSTICE REHNQUIST WHEN THIS PROPOSED CHANGE WAS PENDING BEFORE THE SUPREME COURT. AS I EXPRESSED IN MY LETTER TO THE CHIEF JUSTICE, I HAVE SINCERE CONCERNS REGARDING THIS PROPOSED CHANGE. PURSUANT TO RULE 30(b)(4), NONSTENOGRAPHIC MEANS MAY CURRENTLY BE USED TO RECORD A DEPOSITION WHEN THE PARTIES SO STIPULATE OR WHEN SO ORDERED BY THE COURT. I HAVE NOT BEEN PRESENTED WITH ANY EVIDENCE AS TO WHY THESE AVENUES ARE NOT SUFFICIENT OR WHY THE CHANGE IS JUSTIFIED ON EITHER COST SAVINGS OR EFFICIENCY ENHANCING GROUNDS.

ACCORDING TO THE JUSTICE RESEARCH INSTITUTE, THE AUDIOTAPE AND VIDEOTAPE DEPOSITION PROCESS IS MORE COSTLY THAN THE COURT REPORTER COMPUTER AIDED TRANSCRIPTION SYSTEM AND THE REVIEW OF THE TAPES BY JUDGES AND ATTORNEYS TAKES THREE TO FOUR TIMES LONGER THAN THE REVIEW OF A HARD COPY TRANSCRIPT. IN ADDITION, THE ACCURACY AND INTEGRITY OF THE RECORD WOULD BE WEAKENED BY THIS CHANGE BECAUSE OF THE SUSCEPTIBILITY OF THE AUDIOTAPE AND VIDEOTAPE DEPOSITION PROCESS TO EQUIPMENT MALFUNCTION, RECORD ALTERATIONS, AND SIMPLE CONFUSION OF THE RECORD IF SEVERAL PEOPLE SPEAK SIMULTANEOUSLY. JUDICIAL ECONOMY AND EFFICIENCY WOULD NOT BE SERVED BY THIS PROPOSED CHANGE.

IN ADDITION, I AM CONCERNED BY THE IMPACT THIS CHANGE WOULD HAVE ON PARTICIPATION BY THE HEARING IMPAIRED AND THE VISUALLY IMPAIRED IN THE JUDICIAL SYSTEM. FINALLY, THE IMPACT ON THE 40,000 COURT REPORTERS WHO HAVE SERVED THE SYSTEM SO WELL MUST NOT BE IGNORED.

IN MY JUDGEMENT, IT IS IMPORTANT THAT THE MEMBERS OF THE SUBCOMMITTEE WEIGH THESE ISSUES AS WE CONSIDER THE PROPOSED CHANGE TO RULE 30(b)(4).

APPENDIX 2.—“THE COST OF DEPOSITIONS,” OCTOBER 28, 1992; AND
 “DEPOSITIONS AND ACCURACY,” APRIL 1, 1993, STUDIES CON-
 DUCTED BY THE JUSTICE RESEARCH INSTITUTE

Executive Summary

This report is based on a study of the three methodologies for making and using a deposition: audio, video and a court reporter using computer-aided transcription (CAT). The specific focus is on the development of cost-benefit models which examine both direct and hidden costs.

After describing the study methodology employed, the report evaluates the quantitative and qualitative arguments and facts.

Principal among the report's findings and conclusions are the following:

- An examination of all costs, direct and hidden, in both the taking and use of depositions establishes that audio and video deposition processes are more costly than the utilization of a court reporter using CAT.
- Attorneys express concern over the indiscriminate use of video where no standards exist for taking video depositions and where technicians have no certification requirements.
- In qualitative terms a deposition prepared by a professionally certified court reporter is the standard for accuracy and efficiency of use as seen by trial practitioners.
- System participants (lawyers and judges) utilizing either audiotapes or videotapes report the time required to review a tape increases by a factor of three to four over the use of a hard copy transcript. This increases the cost to the justice system and to the litigant.
- Since the taking of a deposition by a court reporter using computer-aided transcription is less costly than employing audio or videotape, it is fully compatible with the admonitions of the Civil Justice Reform Act of 1990 to reduce the cost of civil litigation.
- The court reporter based CAT system is fully compatible with the mandates of the Americans With Disabilities Act of 1990, affording accessibility to the judicial system for the millions of Americans who are hearing impaired and blind.

I. "Introduction and Methodology of the Study"

Introduction

The historical notes to Federal Rule of Civil Procedure (FRCP) 30(b)(4) declared in 1970 that provision is made for the recording of testimony by other than stenographic means to "...facilitate less expensive procedures...." Significantly, there is no empirical evidence to indicate why the drafters presumed that methods other than stenographic means would, indeed, be less costly. The historical notes do continue, however, by explaining that because electronic or photographic means "...give rise to problems of accuracy and trustworthiness, the party taking the deposition is required to apply for a court order...."

Cognizant that the Standing Committee based its proposed changes to FRCP 30(b)(4) in part on cost considerations, the National Court Reporters Association (NCRA) sought to answer the question, is one method of taking a deposition in fact less costly than another? The Justice Research Institute was engaged in 1992 by NCRA to conduct a cost-benefit analysis of all relevant costs in the deposition process utilizing audio recording, court reporters using computer-aided transcription, and video recording.

It was represented by NCRA and required by the Institute that the study, evaluations and conclusions should be free of influence and unfettered throughout in order that an intellectually honest inquiry might be made. The Institute can report here that those requirements have been met.

Methodology of the Study

There is rightly a desire today to bring the cost of litigation under closer scrutiny. The effort involved in a cost-benefit analysis addresses that desire because it concentrates attention on basic issues. Necessarily, the approach to the subject matter is detailed and methodical.

This study involved the following approach to the information: the collection of data, the construction of cost-benefit analysis models and ultimately the final analysis and conclusions emanating therefrom.

- (a) The study commenced with an exhaustive literature search and a review of all relevant

available materials, published and unpublished. Research facilities consulted included the libraries of the National Center for State Courts, the Federal Judicial Center, the United States Court of Appeals for the Third Circuit, the University of Pennsylvania Law School, and the Philadelphia Bar Association.

(b) It was determined that the modest information available from secondary sources should be enhanced with information collected from contemporary data sites.

(c) Given the reality of time constraints, it was determined that three locations for data collection would be identified by Institute staff. The criteria for data collection sites were then developed and locations were chosen predicated upon:

- (1) Geographic diversity.
- (2) State rules of practice and procedure patterned on the Federal Rules.
- (3) Access to data.
- (4) The presence of cooperative contacts in the jurisdictions including attorneys, court reporters and audio/video persons knowledgeable about the methods being studied.

Based upon these criteria the following data sites were selected:

- (1) Birmingham, Alabama
- (2) Los Angeles, California
- (3) New Jersey

(d) Telephonic discussions with participants preceded on-site visits to each data collection location. In-person interviews were subsequently conducted with attorneys in government and in private practice, the latter reflecting large firms and sole practitioners (representing both plaintiffs and defendants). Interviews were also held with freelance court reporters, audiotape and videotape transcribers and video technicians.

(e) Data site information was then consolidated with all other knowledge, permitting the development of a cost-benefit analysis model and the resulting final analysis and conclusions.

II. Cost Centers Attendant to Taking and Using a Deposition

Introduction

In reviewing and analyzing the cost figures secured from the data sites, we have documented recurring and expected typical "direct costs" for a given method of taking and using a deposition. We define "direct costs" as those expenditures, capital or recurring, which are explicitly acknowledged as a part of a given deposition method.

We have also found a number of "hidden costs." A "hidden cost" is defined as a cost associated with producing or utilizing a deposition which is not patently visible, is less obvious than a direct cost, and is a cost which may be shifted to government at large, tax payers, attorneys or the litigants themselves.

In this section of the report we identify direct and hidden cost centers; that is, the nature and identity of where the cost for making and utilizing a deposition occur. In the cost-benefit analysis models which appear later, the numbers, or dollar costs, are described with particularity. In this section we have also addressed cost centers for audio and video together. Though the actual dollars reflected in the centers differ and will be accounted for separately in the cost-benefit analysis model, the cost centers themselves are the same.

1. Direct and Hidden Costs of Audio and Video

(a) Direct cost centers

- A setup fee and daily rate for recording the deposition by audiotape or videotape.
- The cost of transcribing the tape.

(b) Hidden Cost Centers

- Cost of rental or purchase of playback equipment in court.
- Cost of playback equipment in judges' chambers.
- Cost of playback equipment in attorneys' offices (government attorneys and private counsel).
- Cost of rental or purchase of playback equipment by witnesses.

- The time consumed by trial and appellate judges in reviewing a tape.
 - The cost to litigants of additional review time of tapes by trial counsel which attorneys have estimated increase by a factor of three to four times, in order to review and study a tape in preparation for trial in contrast to a hard copy transcript.
2. Direct and Hidden Costs of a Court Reporter Using Computer-Aided Transcription
- (a) Direct Cost Centers
- The cost of taking and transcribing the deposition.
- (b) Hidden Cost Centers
- Mailing.
 - Notary fees.

III. Qualitative Considerations

Introduction

A cost-benefit analysis tests the "soundness" of proposed activities by a calculation of the value of the resources to be employed in them (the cost) which is compared with the value of the goods or services to be produced (the benefit). Thus, it is implicit in such an analysis to consider perceived benefits or qualitative considerations along with costs.

For each of the methodologies of making and utilizing a deposition, we indicate here a number of recurring salient points from our findings which we believe are important qualitative considerations. The list is not an exhaustive one; rather, it reflects significant points garnered in our study and investigations.

1. Audio

- Not a single attorney interviewed for this study had confidence in audiotape depositions. One attorney even admitted that if the questioning was "going badly," he would cough or rustle papers in front of his microphone to distort the subsequent transcription.
- There presently does not exist (nor do the proposed changes to Rule 30 address) standards to be employed in the taking of audiotape or videotape depositions. Neither does the rule proposed address certification for audio or video operators. In many states before a court reporter may take a deposition, he or she must be a certified shorthand reporter who has passed a rigorous testing process. In addition, a rigorous testing standard is maintained by the National Court Reporters Association.
- Equipment malfunctions of audio equipment do occur. One intermediate appellate judge in a companion study who has been listening to audiotapes for over ten years told us that there had been "no discernable improvement in the quality of audiotapes during that ten-year period."
- Quality audio recording equipment is expensive and requires audio technicians to charge a premium rate in order to get a return on their investment. Inferior equipment produces inaudible and unusable results. When equipment malfunctions do happen, they are typically a result of inadequate maintenance, operator inexperience or flawed tapes.

- We have found no jurisdiction that would permit the use of an audiotape deposition without a transcript being prepared of the audiotape. Thus, a second fee is required, and frequently at a higher rate, by a transcriber who was not present at the time the tape recording was taken.

- Audio recording systems are not computer driven nor interconnected with computers. The introduction of such limited vision technologies is not cost efficient and delays the ultimate computerization of court operations.

- Most federal trial and appellate courts do not have audio playback equipment available. Thus, if attorneys wish to play an audiotape to a court or jury, they must secure rental equipment at a cost to the litigants and often with uncertain reliability.

- In using audiotape, it is critical to purchase high fidelity equipment and to be aware of whether the transcriber has a two-track or four-track system which must be compatible with the recording equipment. Otherwise, voices become mingled and speak over the top of one another, rendering an accurate transcription impossible.

- The quality of audiotapes varies greatly and impacts accuracy. Contributing factors include articulation particles, level of background noise, and equipment which must be properly maintained

2. Video

- An Alabama attorney noted that the most serious potential miscarriage of the use of videotape depositions is the absence of any standards or organized rules for taking video depositions or for using them in court.

- Most all of the qualitative considerations noted for audio are equally applicable to videotape depositions.

- Attorneys in all three jurisdictions studied advised that video was a "valuable strategic tool which could be manipulated to make a certain impact on a jury."

- In each of the jurisdictions studied, both state and federal courts require that a video deposition submitted in court must be accompanied by a written transcript. Thus, if a case is likely to go to trial, or often to make that assessment, counsel must have the transcript prepared either at the conclusion of the deposition being taken or at a later time and at a higher rate.

- One attorney expressed concern that videotape depositions were being used to enable lawyers "to make speeches and to get information before a jury that otherwise would not be admissible." This attorney added that it puts lawyers "in the performance mode and has the clear potential to pervert justice."
- Audiotape and videotape transcribers as well as court reporters advise that when a transcript is prepared after the fact (i.e., sometime after the taking of a videotape), the cost of transcribing from a playback machine can double or triple the cost of the deposition.
- One videotape expert commented that for a tape to be used in court, it had to be indexed and edited. He advised that this work is done by attorneys and paralegals and is "a very expensive process."
- Attorneys in all three jurisdictions advised that videotape depositions were frequently used to intimidate an opponent's witness. One attorney advised that when he and his client arrived for a videotape deposition, the office was set up like a movie set with multiple lights, cameras and staff. He advised that the effect on his client was one of "total submission."
- A government attorney in Los Angeles advised that she is constantly before the court seeking protective orders to prevent videotaped depositions of police officers and other public officials whose identity must be protected. This attorney maintained that this consumes "an awful lot of the court's time and is employed solely as an intimidating tactic."

3. Reporter Using Computer-Aided Transcription

- All attorneys interviewed agreed that a court reporter-prepared deposition is the qualitative standard for accuracy and clarity to which all other methods must be compared.
- A court reporter using computer-aided transcription can provide both a hard copy transcript and a computer disk to counsel.
- Computer disk depositions may be loaded into counsels' software and brought to court for use on a stand-alone computer or as a part of a computer-integrated courtroom.
- A recently developed technology permits court reporters to provide "compressed transcripts" which allow four to nine pages to be printed on a single page of transcript.
- A deposition reported by a court reporter can produce an instantaneous real time rough

copy transcript.

- The opportunity to clarify words and phrases at the time of taking a deposition by the presence of a court reporter precludes the likelihood of inaudibles which cannot be transcribed later.

- It is acknowledged universally that the computer is, and will be, the centerpiece of information transmission worldwide. Thus, a computer-based technology for depositions, such as CAT, has the ability to be integrated with other computer-based technologies, thereby expanding options for judges and attorneys.

- Immediate deposition transcripts are truly only possible with a court reporter using CAT since the other two methodologies necessitate a two-step process of recording and the subsequent production of a transcript by a transcriber.

- All parties who have studied the various methodologies for making a trial court record concur that attorneys and judges work most efficiently by reviewing the written word either in printed transcript form or on a computer monitor. As has been pointed out in the discussion of the other methodologies, the availability of a transcript reduces judges' and attorneys' preparation time by a factor of three to four.

IV. Cost-Benefit Analysis Models

Introduction

The cost-benefit analysis models are derived from interviews and on-site visits, as well as from available secondary resource materials. From that collection of sources we have derived midrange figures for all cost categories. The footnotes in the three models constructed indicate where an average figure between high and low costs have been utilized.

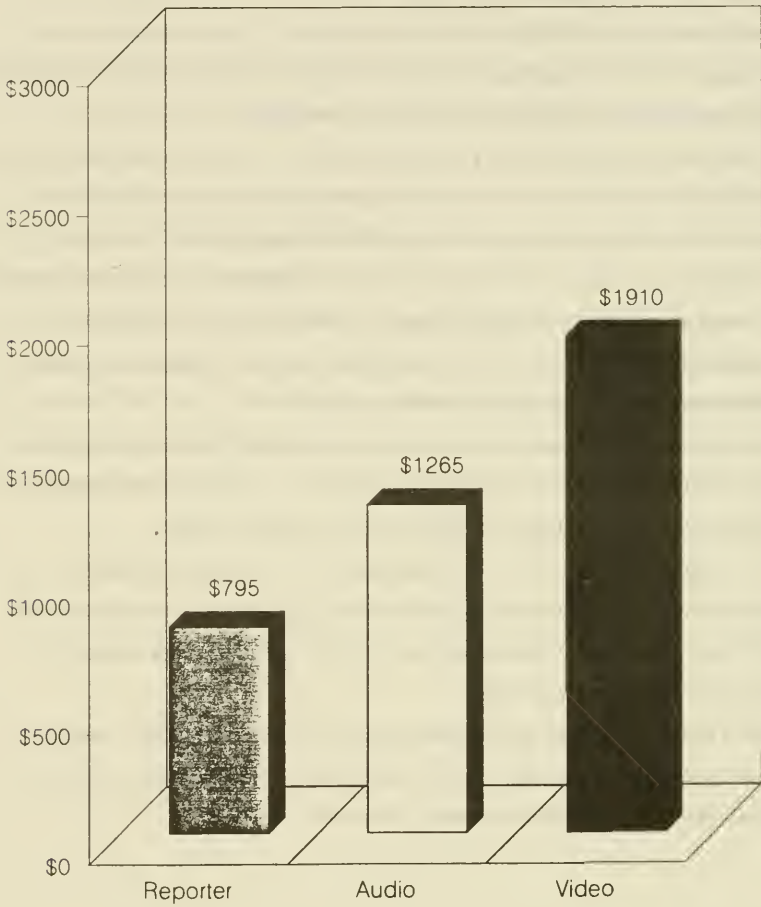
The three cost-benefit analysis models which follow capture the costs associated with the three possible uses of a deposition. The first model is predicated on a factual scenario where a deposition is taken, but the case settles, and it is never utilized in a trial setting. The second model contemplates the taking of a deposition and the use of that deposition in a trial setting when the deposition is required to be in a transcript format. The last model presumes a deposition which is taken and used in court and in the instance of audio and video, it contemplates the unusual situation where a tape is used without a written transcript.

For the sake of uniformity and order, the model contemplates one five-hour day during which 150 pages of deposition are taken by an attorney whose hourly rate is \$100 per hour. The model does not contemplate any extra charges for "waiting time" or expedited charges.

Also, we note here and in the footnotes that the capital cost of equipment purchased by attorneys and courts (and ultimately the cost of replacement equipment) should be amortized over the life of the equipment (5yrs) to derive a per week cost of the equipment. Data supports the figure of 5.3 days on average per civil trial.

Lastly, it should be noted that the model does not address certain administrative costs, including the cost of audiotapes and videotapes and the storage of tapes which, as noted elsewhere, is a matter of very real consideration both in attorneys' offices and in the courts.

Cost of Deposition Not Used in Court



COST-BENEFIT ANALYSIS MODEL - I
DEPOSITION NOT USED IN COURT
ONE DAY AND 150 PAGES OF DEPOSITION

The costs of audio, video and a court reporter using CAT when the deposition is not used in court.

	Audio Costs	Video Costs	Reporter Costs
Taking deposition and setup charges	362 ¹	1,000 ²	495 ³
Attorney review time	900 ⁴	900 ⁴	300 ⁵
Cost of Attorney's Playback Equipment for One Week	2.80 ⁶	10 ⁷	0
<hr/>			
Totals	1,265	1,910	795

¹Rates found were a high of \$375 and a low of \$350.

²Rates found were a high of \$1,500 and a low of \$500.

³Rates found were a high of \$4.15 and a low of \$2.44 per page. In most jurisdictions, such as California, an additional appearance fee is not charged. In limited areas where a fee is charged, the average cost is \$50.

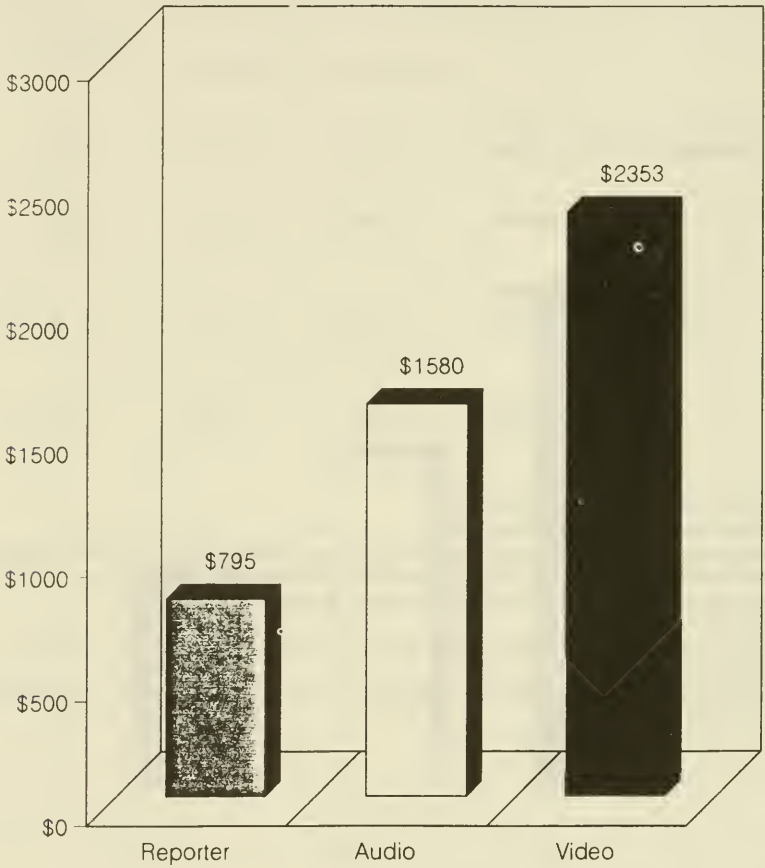
⁴Evidence that attorney review time increased by factor of 3 to 4. Nine (9) hours at \$100 per hour.

⁵Three (3) hours at \$100 per hour.

⁶Average cost of standard cassette playback equipment is \$336. Amortized over the five-year life of equipment, the cost for one week is \$2.80.

⁷Cost of a HI-FI video player, monitor and video cart is \$1,200. Amortized over the five-year life of equipment, the cost for one week is \$10.

Cost of Deposition Introduced in Court With a Transcript



COST-BENEFIT ANALYSIS MODEL - II
DEPOSITION INTRODUCED IN COURT WITH A TRANSCRIPT
ONE DAY AND 150 PAGES OF DEPOSITION

The costs of audio, video and a court reporter using CAT when the deposition is introduced in court with a transcript.

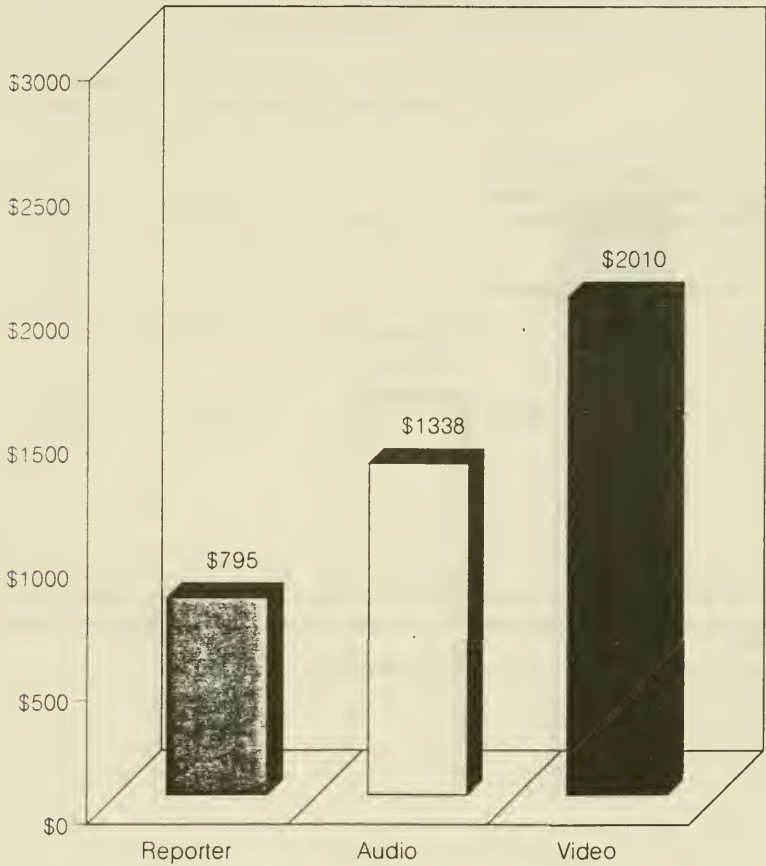
	Audio Costs	Video Costs	Reporter Costs
The total costs of taking and reviewing a deposition are reflected in Cost-Benefit Analysis Model - I	1,265	1,910	795
Cost of transcript preparation	315 ¹	443 ²	0 ³
	<hr/>		
Totals	1,580	2,353	795

¹Rates found for transcribing an audiotape after the fact are a low of \$2.25 and a high of \$4.05. 100 pages at \$3.15.

²Rates found for transcribing a videotape after the fact were a high of \$5.43 per page and a low of \$3.43. 100 pages times \$4.43.

³Transcript cost previously accounted for in Cost-Benefit Analysis Model - I

Cost of Deposition Introduced in Court Without a Transcript



COST-BENEFIT ANALYSIS MODEL - III
 DEPOSITION INTRODUCED IN COURT WITHOUT TRANSCRIPT
 ONE DAY AND 150 PAGES OF DEPOSITION

The costs of audio, video and a court reporter using CAT when the deposition is introduced in court without a transcript.¹

	Audio Costs	Video Costs	Reporter Costs
The total costs of taking and reviewing a deposition are reflected in Cost-Benefit Analysis - I	1,265	1,910	795
² Cost of rental equipment to play tape in the courtroom	70	90	0 ³
Cost of judges' playback equipment for one week	2.80 ⁴	10 ⁴	0
Totals	1,338	2,010	795

¹Our study reveals that rarely, if ever, is an audiotape or videotape submitted in evidence in state or federal courts without a transcript.

²Most trial courts do not have audio and video equipment available for civil cases. Costs reflect average rentals without the presence of a professional technician.

³Hard copy transcript - no equipment required.

⁴See Cost-Benefit Analysis Model - I for explanation of cost of equipment.

V. Analysis and Conclusions

As the cost-benefit analysis models reveal, the cost of recording a deposition by a court reporter using computer-aided transcription is the least costly method across the board. This is true whether the deposition is taken and the case settles or whether a transcript is subsequently made of an audiotape or videotape or, even in the rare instance, where an audiotape or videotape is utilized without a transcript in court.

The case which is made quantitatively is fully compatible with the theme and import of the Civil Justice Reform Act of 1990. That legislation admonishes the Judicial Branch to fashion methods and procedures which bring about a reduction in the cost of civil litigation. Thus, it would seem contrary to other cost reduction movements within the Third Branch to undertake an initiative inherent in proposed changes to FRCP 30(b)(4) which would, in fact, increase the cost of civil litigation.

Once the quantitative issues have been fully addressed, the qualitative case for a deposition prepared by a court reporter using computer-aided transcription is seen in overwhelming terms. The hard copy transcript is clearly the most efficient vehicle for judges and lawyers who are trained to review the written word. Additionally, the automated features of depositions on computer disk enable that medium to be used in the most advanced and technologically based courtrooms of the present and of the future.

VI. Acknowledgments

We acknowledge our debt to those individuals and organizations who contributed to our work. Particular mention, in thanks, is made here to Gary Cramer, Los Angeles, California; Frank Alfana, Esquire, Birmingham, Alabama; William F. Cunningham, Jr., Anaheim, California; Steve Edmondson, Birmingham, Alabama; Mary Thornton House, Esquire, Deputy City Attorney, Los Angeles, California; Tom Eden, Esquire, Birmingham, Alabama; Ben Hyatt (Noon and Pratt), Los Angeles, California; the Cardomon Group, Inc., Doug Mondo (Video Services for the Legal Profession), Santa Ana, California; Jerrold A. Fadem, Esquire, Los Angeles, California; Richard Green, Esquire, Beverly Hills, California; Beth C. Draine, Anaheim, California; John Prout, Springfield, New Jersey; Robert Cirilo, Livingston, New Jersey; John R. Connelly, Jr., Esquire, Red Bank, New Jersey; Kenneth Javerbaum, Esquire, Springfield, New Jersey; Stan Rizman, Newark, New Jersey; Tony Hebson, Esquire, Birmingham, Alabama; Brian E. Cartier, Vienna, Virginia.

The Justice Research Institute

The Institute (JRI) is nonpartisan and is incorporated under the nonprofit corporation law of 1988 in the Commonwealth of Pennsylvania. Its purposes include research, management consultancy, and education for improving the administration of justice in federal, state, and foreign justice systems.

Its principals have provided research and consultancies to numerous justice system entities including the Federal Judicial Center, the congressionally mandated National Commission on Judicial Discipline and Removal, and the Judicial Conference of the United States Committee on Long-Range Planning. The Institute has also contributed to the work of the Carnegie Commission on Science and Technology in Judicial and Regulatory Decision Making, and the National Academy of Public Administration.

JRI conducted an analysis and made recommendations respecting cost and delay in civil litigation in the United States District Court for the Southern District of California and the District Court of the Virgin Islands of the United States.¹ The Institute also recently assisted the senior staff officers of the Supreme Court of the United States in developing that institution's first-ever mission statement and strategic plan for operations.

Staffed by MBAs as well as attorneys and former court executives, the primary consulting focus of the Institute is the introduction of sound business practices into justice system infrastructures. The applied experience and expertise of its principals in state and federal court management combine to make the Justice Research Institute the only organization of its kind in the United States with researchers who also have had successful hands-on experience in court systems.

The Institute is headed by William K. Slate, II, who has over 20 years of policy, management and research experience in both state and federal courts. An attorney with an M.B.A. from the Wharton School of the University of Pennsylvania, Mr. Slate served as director of the congressionally chartered Federal Courts Study Committee, which undertook the first comprehensive study of the federal court system and its relationship to state courts in the history of the nation.

¹Cost and delay reductions in civil litigation were mandated by Congress in the Judicial Improvements Act of 1990, codified at 28 U.S.C. §§ 471 - 482.

Executive Summary

This report considers the principal methodologies employed today in the taking of depositions, namely, an official court reporter utilizing computer-aided transcription (CAT) and, to a lesser degree, videotaping. Its focus is upon the accuracy of the process, and, as noted in the Introduction, "accuracy" is not one dimensional.

Principal among the report's findings are the following:

- **Accuracy should be the standard for selecting a deposition methodology.**

Both historically and at the present, a court reporter deposition is the qualitative standard for accuracy and clarity. A court reporter's goal is verbatim transcription--that is the federal standard. Videotaping transcription, by contrast, has sought and been content with a standard based on the concept of "faithfulness," or a faithful representation of what was said at a legal event.

- **The deposition process should not be relegated to a lesser standard than other aspects of court proceedings.**

It should not be lost on policymakers considering rules related to depositions that depositions admitted into court must invariably be in transcript format; trial courts require court reporters for "important" cases; and appellate courts, in the federal court system, and almost without exception in state court systems, will not permit videotapes only but require hard copy transcription.

- **The congressionally mandated Civil Justice Reform Act of 1990 requires United States district courts to reduce the cost of civil litigation.**

A recent cost-benefit analysis of methods of taking depositions found that across-the-board court reporter depositions were the least expensive to the entire system. It would be in conflict with the Civil Justice Reform Act to promulgate a rule which would increase the cost of civil litigation while in no demonstrable fashion enhancing levels of accuracy.

- **The computer character of a CAT deposition is compatible today with automated courts and law offices.**

Videotape depositions are not computer compatible, and their use insures that cost will be increased to court systems, clients, and attorneys while forestalling systemwide automation.

- **The storage life of videotapes is unknown and is a matter of concern to federal officials, including those at the Library of Congress.**

Delay in the transcription of a videotape raises serious questions about storage life of the tape, the quality of the tape and equipment at the original taping, and a substantial increase in transcription costs.

Introduction

This report is about accuracy in the process of taking depositions. Its focus is upon two methodologies, namely, court reporter-prepared depositions utilizing computer-aided transcription and videotaping. While audio depositions are possible, we have found only one instance of their use.²

This report relies on empirical research, including the review of pertinent statutes, cases, treatises and studies, and also upon field research in Alabama, California and New Jersey undertaken by JRI in 1992 in conducting a cost-benefit analysis of the cost of depositions. The referenced field research included interviews with attorneys in government and private practice, tape transcribers, court reporters and videotape operators. The 1992 Institute study is the sole source in the literature of an examination of the cost and qualitative considerations of the deposition process.

As indicated in this report, notions of accuracy encompass issues beyond definitions and standards to include the integrity of the storage of deposition mediums; the time required for participants to review a deposition; the computer compatibility of deposition formats with courts and law offices; and even costs when juxtaposed with a prospect of policymakers encouraging a more costly method which brings no promise of enhanced accuracy.

²Although a 1983 evaluation of audiotape in district courts, A Comparative Evaluation of Stenographic and Audiotape Methods for United States District Court Reporting, by J. Michael Greenwood, Julie Horney, M. Daniel Jacobovitch, Frances B. Lowenstein, and Russell R. Wheeler, Federal Judicial Center, July 1983, concluded that "given appropriate management and supervision, electronic sound recording can provide an accurate record of proceedings at reduced costs . . .," that report received formidable criticism of its statistical methodology and cost analysis from no less an authority than Coopers and Lybrand (letter and report of September 20, 1983). That report concluded, "In terms of cost, the Federal Judicial Center's study has serious shortcomings. Until these are corrected, any findings on accuracy will not demonstrate the cost effective feasibility of audio recording as a replacement for the current functioning court reporting system."

It is also particularly noteworthy that although audiotape has been allowed in federal district courts since 1984, according to the Administrative Office of U.S. Courts, as of October 1991, only 53 active judges out of 540 employed a full-time operator for ER record making. Thus, one may conclude that federal judges have not been enthusiastic in embracing taping methods over official court reporters.

1. Accuracy

(a) Definition of Terms

The statute governing proceedings in United States district courts requires that they "shall be recorded verbatim."³ The dictionary standard of verbatim is "word-for-word."⁴

The statute further specifies the situations in which transcripts should be produced from the record and states that the certified transcript "shall be deemed *prima facie* a correct statement of the testimony taken and the proceedings had," and hence accurate.⁵

Thus, the statute calls for a "verbatim record" and for a transcript that is "a correct statement" of both the testimony and of other aspects of the proceedings.

Evaluations of alternative techniques for court record making (including depositions) have traditionally used accuracy (of the record and the transcript made from it) as a central evaluation criterion. Accuracy "refers to the legal concept of a verbatim record, and it presupposes that what a court reporter does is record word-for-word what was said..."⁶

The importance of accuracy in court proceedings was captured by the following quotation from Judge Levin H. Campbell, former chief judge of the First Circuit Court of Appeals and former chairman of the Judicial Conference Subcommittee on Supporting Personnel. His statement appears in a letter of November 30, 1981, to William J. Anderson of the General Accounting Office:

"The maintenance of a record of proceedings in a trial court is absolutely essential to the working of our judiciary. There can be no meaningful right of appellate review without an accurate trial record. Our aim, therefore, must not be just to report court proceedings in the cheapest possible way but to do so in the way best calculated to advance the administration of justice. Electronic sound recording may eventually prove to be such a method. But if the present system of recording court proceedings were to be replaced by a

³28 U.S.C. § 753(b); see also two federal cases explaining "accuracy": U.S. v. Taylor, 607 F.2d 153 (1979) and U.S. v. Perkins, 498 F.2d, 1054 (1974).

⁴Webster's New Collegiate Dictionary.

⁵28 U.S.C. § 753B; Federal Courts Improvement Act of 1982 § 401(a).

⁶Videotaped Trial Records, a publication of the National Center for State Courts, p. 50 (1990).

markedly inferior system, the financial savings would be vastly outweighed by devaluation of our system of justice."⁷

Historically, court reporters using stenographic equipment have been the standard for accuracy. This was true even before the advent of computer-aided transcription, which, as will be related subsequently, enhances a court reporter's level of accuracy.

A limited number of "head-to-head" encounters between stenographic and tape methods (employing the use of a tape followed by a transcriber preparing a transcript) have occurred. When they did, the accuracy of court reporters inevitably prevailed.

In a 1971 New York study, several days of the same court proceedings were recorded by stenographic and audiotape methods. A subset of the transcript pages produced on the basis of these records was compared for accuracy. The committee members (judges, lawyers, and administrators) stated, among other things, that the steno-based transcripts were more accurate and that the audio-based transcripts more often omitted complete statements of participants and misidentified speakers than did the steno-based transcripts.⁸

In 1972, Los Angeles Superior Court undertook a comparative study at the suggestion of the state legislature. Fifteen days of proceedings were recorded by both audiotape and stenographic methods. Some 2,000 pages of transcripts were typed on the basis of records produced by stenographic and audiotape methods, 418 pages of which were subjected to detailed analysis. Discrepancies between the audio and steno-based transcripts were checked against the sound recordings. The researchers found that the steno-based transcripts "in all but two tests proceedings, performed with a higher degree of accuracy than the paralleled-tested reporting/recording systems."⁹

⁷General Accounting Office, Federal Court Reporting System (1982).

⁸The commission was appointed by the presiding justices of the appellate divisions of New York's first and second judicial departments. See Report of the Committee to Evaluate Electronic Recording Techniques (1971).

⁹Superior Court, County of Los Angeles, Recording and Transcription of Los Angeles Superior Court Proceedings (1972).

As a part of a 1981 study conducted by the Utah State Court Administrator's office, one trial lasting several days was recorded on a four-track audiotape recorder. The transcript was produced from the audiotape and compared with the steno-based transcript, which was the standard by which the accuracy of the audio-based transcript was determined. Those conducting the study found 107 errors and omissions in the audio-based transcript and concluded that the "high number of errors appearing in the study sample renders the record suspect and the integrity of the system diminished. Should the appellate court be compelled to base its decision on an incomplete and unreliable record, it would have to do so on less than the total evidence presented at trial or upon conjecture as to what may have been."¹⁰

Lastly, in a 1992 cost-benefit analysis study of the deposition process by JRI in Alabama, California and New Jersey, all attorneys interviewed agreed that a court reporter-prepared deposition is the qualitative standard for accuracy and clarity to which all other methods must be compared.

(b) Accuracy vs Faithfulness

A more recent assessment of video recording¹¹ abandoned notions of "accuracy" because it "... proved to require a system of discrepancy classifications that is complex, expensive to undertake and, ultimately, subjective."¹² In lieu of accuracy comparisons, video proponents have substituted "faithfulness."¹³

"The concept of a faithful representation of what was said or experienced at the legal event is the genuine distillation of the true meaning of the verbatim record..."¹⁴

¹⁰The results of this test were reported in a January 25, 1982, memorandum from Richard V. Peay, Utah State Court Administrator, to Utah Senator Kay Cornaby of the Joint Executive/Judicial Appropriation Subcommittee on "Studies Regarding Shorthand Reporters in the Utah District Court."

¹¹Videotaped Trial Recordings, a publication of the National Center for State Courts, p.51 (1990).

¹²Ibid.

¹³Ibid.

¹⁴Ibid.

On their face, the terms "accuracy" and "faithfulness" are not synonyms. Indeed, it is an oxymoron to suggest that accuracy of a proceeding is reflected in the distillation of the true meaning of the verbatim record. This is not the standard for court reporter-prepared depositions.

A methodology, such as video, which relies on "faithfulness," as contrasted with "accuracy," suggests a diminution of standards; and as the "faithfulness" definition indicates, a "... distillation of the true meaning of the verbatim record" is not "accuracy" in terms of a verbatim, word-for-word transcription.

(c) Standards to Ensure Accuracy

A number of important foundation questions related to accuracy must be addressed by decision makers respecting performance standards employed in the use of stenographic or videotape deposition methodologies. Court reporters employing computer-aided transcription (CAT) in a competitive market place must exhibit proficiencies and certification standards in order to qualify and compete for deposition business.¹⁵ By contrast, videotape operators have no standards for the equipment to be utilized, nor the setting in which videotapes will be recorded. Also, there are no judicial or governmental standards for proficiency of video operators. Similarly, transcribers who will, when needed, prepare a transcript from a videotaped deposition are unregulated.¹⁶

Instances of videotape equipment failure and defective tapes in court and under controlled conditions are numerous.¹⁷ These facts raise serious questions about opportunities

¹⁵The author of a National Center for State Courts report on videotaping summarizes the views of Professor Saari by observing "The union of understanding between court reporter and lawyer about what is relevant to the record is central to Saari's argument that court reporters, like lawyers, are professionals.," Videotape Trial Records, p. 96 (1990).

¹⁶We have found no certification boards on standards for transcribers.

¹⁷In a 1992 study, a Kentucky court administrator despaired that a problem with videotaping was that "... the courtroom monitor frequently does not know when a breakdown is occurring. Thus, some days we may have pictures without sound, and on other days, sound without clear pictures ..." Court Reporting Technologies: A Cost-Benefit Analysis and Qualitative Assessment, JRI, p. 22 (1992).

for equipment failures in lawyers' offices and the impact on the justice system when there is a delay between videotaping and transcription.

Also, the integrity and accuracy of the record being produced is more likely compromised by the involvement of multiple parties, i.e. a videotape operator and a transcriber¹⁸ as contrasted with one individual both taking down and preparing a transcript based upon computer-aided technology and the reporter's own built-in CAT dictionary.

In addition, because the CAT methodology records the words in writing simultaneous to their being spoken, produces an instantaneous unedited hard copy transcript, with the proceedings being stored on a computer disk for further use by attorneys and judges, the process is self-contained, and the integrity and accuracy of depositions is greatly enhanced.

It is acknowledged universally that the computer is, and will be, the center-piece for information transmission worldwide. Law offices, courts and government, at all levels, are increasingly being computerized. Thus, it is important for policymakers not to encourage the use of systems which will forestall or impede the computerization of court record making, stunting opportunities for system advancement compatible with other branches of government and the private sector, and actually costing government and the public more money over time.

Also, a CAT deposition is readily usable today as a component of a computer-integrated courtroom (CIC). The emergence and growth of CIC courtrooms is taking place in both state and federal court systems.

2. The Deposition Process

The practice of deposing witnesses and the reliance upon the deposition in the settlement or progress of a case essentially is manifest in one of two scenarios: (1) the

¹⁸The problems for transcribers relying on tapes is highlighted by a statement printed here in its entirety from the chief of reporting services in New Jersey to transcribers: "The terms 'indiscernible' and 'inaudible' can no longer be used in Superior Court transcripts. Transcribers must listen to each track of the tape until they can discern what was said. The only exception to this is that the term 'indiscernible' may be used when it is clear something was said that is part of the record and no track recorded it." Superior Court of New Jersey, Appellate Division, Unpublished memorandum to transcribers (dated October 2, 1991).

deposition is taken, is utilized by the parties for settlement or trial preparations and is not introduced at trial; (2) the same process is replicated, and the deposition is introduced at trial.

In studies conducted by the Institute within the past 12 months as referenced earlier, the deposition process was examined in the states of Alabama, California, and New Jersey. Attorneys were interviewed who practice in both federal and state courts. Although videotape depositions were infrequently employed, they were never introduced into court in any of the jurisdictions without an accompanying printed transcript.¹⁹ Thus, the reality is that if a deposition is going to be used in court, it will be transcribed. One could therefore conclude that the use of deposition methods other than by a court reporter using CAT places one in a kind of "Russian roulette" where one is wagering on the odds that a deposition will not be used at trial.

Even when a deposition is not introduced in court, if it is going to be utilized it must be reviewed. If review time of a videotape, as even videotape proponents acknowledge, takes three to four times longer than reviewing a transcript, then opportunities for error and inaccurate conclusions are increased.²⁰ Quite obviously, additional review time results in additional charges and costs to clients.

¹⁹Attorneys in Alabama reported that for reasons which are inexplicable, a practice commenced of videotaping physicians' depositions. Attorneys in California (in private practice and in government) advised that videotaping was frequently employed as an intimidating tactic.

²⁰In discussing "ease of review," the National Center for State Courts' study on videotaping found, "The fact that a videotaped record is more difficult to review is obvious to anyone who compares the two experiences, and no conclusion from the evaluation emerged as clearly as this one: attorneys and judges do not like to work with the tape routinely, and there is nearly universal agreement that it is more time-consuming to work with a videotape than with a written transcript.," Videotaping Trial Records, p. 54 (1990). Also, see The Cost of Depositions: A Cost-Benefit Analysis, at p. 9, JRI (1992) where transcribers and court reporters advised that "... when a transcript is prepared after the fact (i.e., sometime after taking a videotape), the cost of transcribing from a playback machine can double or triple the cost of the deposition."

3. The Storage of Tapes, Hard Copy and ASCII Disks

The "future" accuracy as related to the long-term life and dependability of videotapes is literally unknown. The National Archives and the Library of Congress are studying the issue, but no credible source (the only exception is vendors) is willing to even venture a qualifying estimate of the life of a tape. It is known and documented that tapes become brittle and "bleed through" unless kept in climate controlled conditions, free of dust and humidity. In an earlier study conducted by the Institute, it was documented that tapes are usually kept on open shelves or, at best, in metal filing cabinets.

In contrast, the hard copy life of depositions substantially exceeds the ten years required in most jurisdictions for court reporters to retain their case-related notes and materials. Additionally, today attorneys may opt for an ASCII disk (computer compatible) in addition to or in lieu of hard copy. As indicated earlier, the computer compatibility of an ASCII disk, in concert with its having been contemporaneously transcribed, underscores the integrity and accuracy of the document.

4. The Ultimate Need for a Transcript at Trial and on Appeal

The importance and, indeed, the requirement for transcripts and the involvement of court reporters at trial and the requirement of transcripts on appellate review should not be lost on policymakers contemplating related rules changes:

- Proponents of options other than court reporters invariably acknowledge that court reporters should be available for "important civil cases and criminal trials." This was yet again acknowledged in the 1991 Supreme Court Report of the State of New Jersey where the report called for the use of other methods, but said that official court reporters should continue to make the record in "... capital cases, most jury trials, and some exceptional non-jury trials ..."
- As to appellate review, both federal and state intermediate and supreme courts, with very few exceptions, require a hard copy transcript of all proceedings under review. Every federal circuit and state supreme courts in New Jersey, Michigan and most other states have such a requirement.
- A chairman of the Civil Rules Subcommittee of the Judicial Conference of the United States acknowledged in a May 1, 1992, letter to the chairman of the

Standing Committee on Rules of Practice and Procedure that "none of the published amendments has received a larger number of objections than the proposal relieving parties from the necessity of obtaining court approval or agreement of other parties as a condition to taking depositions by non-stenographic means." The chairman goes on to say, however, that any objections to the proposed amendments have been adequately dealt with because new Rule 30(b)(4) permits "... other parties to arrange for a stenographic transcription if they choose to do so and require a party proposing to use video or audio recordings at trial to prepare and furnish to adversaries and the court a transcript of the portions to be offered." Thus, once again, the importance and value of transcripts is underscored.

In the face of facts disclosing that depositions admitted at trial are required to be in written transcription format; court reporters preparing transcripts are required for all "important" cases; and appellate and supreme courts invariably require hard copy transcripts and do not permit videotapes, the question immediately arises as to why the taking of depositions should be relegated to a lesser standard, and does the differentiation in practices suggest that accuracy and accessibility are important at the trial and appellate levels, but are any less an issue at the pretrial stage. In view of the increasing importance of the settlement of cases in light of growing civil caseloads, accurate and accessible depositions would appear to take on heightened importance in the civil justice arena.²¹

5. The Cost of Depositions

In 1992, the Justice Research Institute conducted a cost-benefit analysis study and constructed cost-benefit analysis models for depositions by audio, video and court reporter. The models considered depositions taken but not used in court, depositions introduced at trial with a transcript, and also the rare instance when a deposition was introduced at trial without a transcript. Cost-benefit analysis models revealed that the cost of recording a deposition by a court reporter using computer-aided transcription is the least costly method across the

²¹In regard to the videotaping of depositions, a proponent of videotaping in a published California CLE article was frank to say, "Videotaping without a court reporter present raises problems. There is still no good way to rapidly review a videotape, to edit it, or to present it to the court for motions. In my opinion, videotaping should always be accompanied by a stenographic record." "Trial Run, the Videotape Revolution," 12 CEB CIV LR, p. 190 (August 1990).

board. This is true whether the deposition is taken and the case settles, or whether a transcript is subsequently made from a videotape or, even in the rare instance, where a videotape is utilized without a transcript in court.²²

Thus, the case established quantitatively of a lower cost for court reporter (CAT) depositions is fully compatible with the theme and import of the Civil Justice Reform Act of 1990. That congressional legislation admonished the judicial branch to fashion methods and procedures which would bring about a reduction in the cost of civil litigation. Thus, it would seem contrary to other cost reduction initiatives within the third branch to promulgate a rule of practice and procedure which would, in fact, increase the cost of civil litigation.

Additionally, the time consumed by intermediate appellate court and supreme court judges, central legal staff, personal law clerks and private practitioners in reviewing videotape records on appeal is substantial. Lawyers are trained, whether on traditional hard copy or through computer screens, to read quickly the written word. By contrast, the forwarding and reversing of videotapes and the attempt to follow tape logs of widely varying accuracy and style results in an inordinate time consumption and expense to the system. Estimates from appellate judges and lawyers indicate that the time required to review on a videotape is tripled or quadrupled over review of a written transcript.

Also, if the use of videotape depositions is encouraged, then court systems must be prepared to purchase playback equipment for all justice system participants, including trial judges, appellate judges, public defenders, corrections officials, and clerks' office personnel. To note just one figure in these regards, the cost of video equipment for a nine-judge intermediate appellate court today approximates \$32,000. Plaintiffs and defense attorneys must also purchase equipment and tapes if the video process is employed.

²²As to the cost of depositions not used in court, the relative costs were \$795 for a court reporter and \$1,910 for videotape. For a deposition introduced at trial, the costs were \$795 for a court reporter and \$1580 for video. The Cost of Depositions: A Cost-Benefit Analysis, JRI, pp. 11 - 15 (1992).

6. Conclusions

Our analysis of the issues concerning deposition methodologies by court reporters utilizing CAT or videotaping, and our review of the literature and the earlier referenced field studies, lead us to the following conclusions:

- Accuracy should be the standard for selecting a deposition methodology. Both historically and at the present a court reporter deposition is the qualitative standard for accuracy and clarity. A court reporter's goal is verbatim transcription--that is the federal standard. Videotaping transcription by contrast has sought and been content with a standard of the concept of "faithfulness," or a faithful representation of what was said at a legal event.
- It should not be lost on policymakers considering rules related to depositions that depositions admitted into court must invariably be in transcript format; trial courts require court reporters for "important" cases; and appellate courts, in the federal court system, and almost without exception in the state court systems, will not permit videotapes but require hard copy transcription. The deposition process should not be relegated to a lesser standard.
- The Civil Justice Reform Act of 1990 promulgated by the Congress directed United States district courts to fashion rules and processes for reducing the cost of civil litigation. A recent cost-benefit analysis of methods of taking depositions found that across the board court reporter depositions were the least expensive to the entire system. It would be in conflict with the Civil Justice Reform Act to promulgate a rule which would increase the cost of civil litigation while in no demonstrable fashion enhancing levels of accuracy.
- Delay in the transcription of a videotape raises serious questions about storage life of the tape, the quality of the tape and equipment at the original taping, and the substantial increase in transcription costs.
- It is intuitive that multiple players in the deposition process, i.e., a videotape operator and a transcriber, enhance the likelihood of error, "unintelligibles", and "inaudibles."
- The computer character of a CAT deposition is compatible today with automated courts and law offices. Videotape depositions are not, and their use insures that cost will be increased to court systems, clients, and attorneys while forestalling systemwide automation.

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APPENDIX 3.—SUPPLEMENTAL STATEMENT SUBMITTED BY HON. WILLIAM W SCHWARZER, SENIOR U.S. DISTRICT JUDGE, U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, AND DIRECTOR, FEDERAL JUDICIAL CENTER, JUNE 28, 1993

This supplemental statement is being submitted at the request of the Chairman 1) to respond to the subcommittee's questions, and 2) to provide certain additional information.

My previously-submitted statement noted that the proposed amendments of the discovery rules are aimed principally at cases involving relatively small stakes, since in large cases the court is likely to enter case management orders dealing specifically with discovery matters. The amendments implement the policy of proportionality in discovery underlying Rule 26.¹ At present, notwithstanding these provisions, discovery activity, for a variety of reasons such as excessive adversariness, attorney inexperience or lack of competence, or profit motives, frequently becomes disproportionate to the stakes in the case; many lawyers will say that it is difficult if not impossible to litigate economically a case involving less than, say, \$200,000 in federal court, given the cost of discovery. There are many more civil cases involving stakes of less than \$200,000 than there are "big" cases (such as product liability cases).² Although judges have the authority to control the amount of discovery activity in these cases, the heavy calendar burdens in many courts often make this impractical except in the large cases.

These amendments would introduce a number of self-executing measures aimed at reducing discovery activity (including, for example, the presumptive limit of ten depositions per side). Mandatory pre-discovery disclosure of core information is one of these measures. It would reduce the need for certain discovery and make remaining discovery more efficient in three ways: 1) by requiring disclosure of prospective witnesses, parties will not have to incur the expense of trying to discover their identity; 2) by requiring identification of relevant documents, parties will not have to go through the often time-consuming, expensive, and contentious process of obtaining that information; and 3) by giving parties this information early on, they will be better able to determine their discovery needs and conduct whatever discovery is needed more efficiently and economically. The early exchange of this information will have the additional benefit of facilitating the evaluation of the case, leading to earlier settlements.

As previously noted, about 20 districts have incorporated into their expense and delay reduction plans under the Civil Justice Reform Act some form of mandatory disclosure. No

¹Rule 26(b) presently provides: "The frequency or extent of use of the discovery methods . . . shall be limited by the court if it determines that . . . (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation."

²The FJC data base discloses that of the universe of complaints with prayers alleging specific dollar amounts, approximately two thirds seek less than \$200,000. Another indication of the prevalence of small cases is that of the civil cases going to trial, two thirds are tried in two days or less. 1992 Report of the Administrative Office of the United States, Table C-8

studies have been conducted of these programs but none of the informal reports we receive from time to time from these districts have indicated that problems have been encountered.

Finally it should be noted that while there has been considerable controversy over pre-discovery mandatory disclosure, it is only one part of the package of changes incorporated in the proposed amendment of Rule 26. Pre-discovery disclosure is one of three levels of disclosure called for by the proposed amendment. The other two levels are: 1) disclosure of expert witness reports and their supporting data not less than 90 days before trial, and 2) disclosure of trial witnesses and exhibits not less than 30 days before trial. These provisions incorporate what is generally regarded as sound case management practice and can make significant contributions to the reduction of litigation cost and delay. There appears to be no opposition to these amendments.

With respect to the amendment of Rule 30 concerning the transcription of depositions, it should be noted that Rule 32 contains significant limitations on the use of depositions at trial. Generally a deposition may be used against an adverse party, to impeach a witness, or where a witness is unavailable. As a practical matter, lawyers will rarely present evidence by deposition if a live witness is available. They take depositions primarily for two purposes: to discover what an adverse witness would say if called and to preserve the testimony of a witness who may become unavailable. At trial their principal use is for impeachment, but realistically it is more often to threaten impeachment than to actually establish it. In sum, although many depositions are taken, few are ever used at trial and of those that are used only a very small fraction of the transcript is referred to. Unfortunately, no data are available to permit one to quantify these observations but experience leads me to believe (and this, admittedly, is only an educated guess) that less than 5% of the transcript pages of depositions taken ever appear in a trial record.

APPENDIX 4.—STATEMENT OF MESSRS. ARCHIBALD, FOX, HANGLEY,
KIEVE, AND WEINER, June 16, 1993

**"DISCLOSURE" SHOULD BE DELETED FROM
PROPOSED RULE 26(a)(1)**

We are practicing trial lawyers who have a longstanding interest in making litigation less costly and time-consuming, for our clients as well as the public in general. We support most of the proposed amendments to the Federal Rules of Civil Procedure.

For the reasons set forth below, however, we urge Congress to use its inherent and statutory powers to disapprove the proposed "disclosure" system in the proposed amendments to the Federal Rules of Civil Procedure transmitted to Congress by the Chief Justice on April 22, 1993 because:

1. The "disclosure" system was, and is, opposed by virtually every segment of the bar and the public, including plaintiffs' groups, the defense bar, the public interest bar, the federal government and numerous federal judges and law professors.

2. The "disclosure" system represents a fundamental change in our traditional and time-tested adversary system of justice, requiring client and counsel to try to fathom and then turn over what information and documents the other side might believe it should have in pressing its case.

3. — As Justice Scalia (joined by Justices Souter and Thomas) stressed in his dissent from the Court's adoption of the "disclosure" system:

By placing on lawyers the obligation to disclose information damaging to their clients — on their own initiative, and in a context where the lines between what must be disclosed and what need not be disclosed are not clear but require the exercise of considerable judgment — the new [disclosure] Rule would place intolerable strain upon lawyers' ethical duty to represent their clients and not to assist the other side. Requiring a lawyer to make a judgment as to what information is "relevant to disputed facts" plainly requires him to use his professional skills in the service of the adversary.

4. The Chief Justice's transmittal letter to Congress pointed out that, "[w]hile the Court is satisfied that the required procedures have been observed, this transmittal does not necessarily indicate that the Court itself would have proposed these amendments in the form submitted." Justice White's concurrence made essentially the same point.

5. The adoption of "disclosure" across-the-board for all federal district courts is directly contrary to the letter and spirit of the Civil Justice Reform Act of 1990 ("CJRA"), which calls for each district court to determine, on a trial basis, what specific reforms — including if it wishes some model of a disclosure system — might best work for that particular district to reduce costs and delay in civil cases. A large number of district courts have declined to adopt a "disclosure" system in their CJRA plans because they believe it will add costs and delay, rather than reduce them.

6. At a minimum, until the results of these localized experiments are in, it would be premature — not to mention counterproductive — to adopt disclosure, much less a particular form of disclosure, for the entire federal district court system.

Background

On April 22, 1993 the Supreme Court adopted a number of changes to the Federal Rules of Civil Procedure. They will go into effect on December 1, 1993 unless Congress acts to overturn them. The most controversial, and we believe objectionable, change is the adoption of mandatory "disclosure" requirements in the discovery rules.

As articulated in the proposed amendments, "disclosure" (1) subverts a lawyer's ethical obligation to represent and advocate his or her client's interest, not that of the adversary, (2) places an unduly complicated overlay on an already overburdened system and (3) is contrary to the provisions and spirit of the Civil Justice Reform Act of 1990 that such

experiments are to be tested first in local district courts before they are adopted across-the-board for every district court in the country.

The Present Discovery System:

Under the present discovery system, if one party wants documents or information from the other side, it is required to ask for it. The other side can then object and, if the parties cannot agree, the court will decide what information or documents have to be produced.

The key is that only the information or documents that are actually asked for have to be produced. This gives the party being asked for them a fairly clear idea of what the other side wants, and hence what it has to look for. Well-run courts have developed a number of procedures to deal with the potential for abuse, including presumptive limits on discovery. See generally Kieve, Discovery Reform: Maybe the Best Solution Is No Discovery At All, ABA Journal (Dec. 1991) (attached hereto at tab A).

The Proposed New "Disclosure" System:

A radically different system will now apply under the new disclosure provisions in amended Rule 26.

At the start of the case, each side will automatically be required to disclose to the other side the following information and documents:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information;

(B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings; [and]

(C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered;

The revised rule provides that these disclosures must be made at the very beginning of the lawsuit and that,

. . . [a] party shall make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

The theory is that, armed with this information, the parties will be in a better position to evaluate the case for settlement or to determine what additional information they need to prepare it for trial.

"Supplementation" of "Disclosures" and Pleadings:

The new rules also require a litigant to make further disclosures throughout the case "at appropriate intervals,"

. . . if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

There are sanctions — including the preclusion of any information or witness not disclosed — for a failure to make the required disclosures or supplementation.

The panoply of other discovery devices — interrogatories, document requests, requests for admission and depositions — are still available, although there are presumptive limits on the number of interrogatories and depositions that can be taken without court order. Traditional discovery cannot, however, be started until disclosure has taken place.

The Evolution of the "Disclosure" Concept:

Objections to the first "disclosure" proposal:

An earlier August 1991 version of the disclosure idea was circulated for public comment by the Advisory Committee on Civil Rules. Virtually every segment of the profession opposed it: the plaintiffs' bar, the defense bar, public interest groups, the Justice Department and a large number of able federal judges and law professors. The February 7, 1992 comments of the then-Chair of the ABA Section of Litigation, Theodore R. Tetzlaff (attached hereto at tab B), were typical.

A major objection was that the standards for what had to be disclosed were too vague, and would lead to more, not fewer, wars over discovery. What one side might view as documents or names of potential witnesses that "are likely to bear significantly on any

claim or defense" is apt, particularly given the adversary system, to be substantially different from what the other side would say is called for under this language.

And as the Tetzlaff comments pointed out, "there is a basic philosophical problem posed by engrafting a disclosure system onto the body of an adversary system of justice which is likely to reject it as fundamentally incompatible tissue."

There was also a procedural objection: various forms of disclosure were already being adopted as experimental rules in several district courts under the Civil Justice Reform Act of 1990. It did not make sense to adopt disclosure (much less any particular kind of disclosure) before the results of these local court experiments had been assessed.

At first, the Advisory Committee heeded these objections and declined to adopt any form of "disclosure." A month later, however, it changed its mind and approved a new form of disclosure that had never been circulated for public comment.

A distinguished member of the Committee, Charles Alan Wright (who dissented), pointed out that by sending the proposed amendments to the Court in the face of strong opposition from virtually all segments of the bar, the Committee could "jeopardize the continued existence of the court rule-making process." Justice White's concurrence in the Supreme Court's adoption of the current proposed amendments echoes this concern.

Problems with the current proposal:

The May 1992 revisions to the proposed amendments — the ones ultimately adopted by the Judicial Conference and sent to the Supreme Court, which in turn has passed them on to Congress — sought to address these problems, but actually made them worse.

Notice pleading no longer applies

The Federal Rules of Civil Procedure are still modeled on "notice pleading" requiring (in Rule 8) only "a short and plain statement of the claim showing that the pleader is entitled to relief." A plaintiff merely has to allege that one more defendants "negligently drove or caused to be driven a motor vehicle against plaintiff" Form 10, Fed. R. Civ. P.

The proposed "disclosure" version would require the parties to "disclose" potential witnesses and documents with information "relevant to disputed facts alleged with particularity in the pleadings."

As the Advisory Committee notes candidly state, "[t]he greater the specificity and clarity of the allegations in the pleadings, the more complete should be the listing of potential witnesses and the types of documentary evidence."

What this means is that notice pleading is now effectively a dead letter. If counsel wants to discover whether the defendant in an insider trading case has ever kicked his dog, he or she will simply allege that this is so (and, of course, evidences the defendant's lack of good character) — and therefore will presumably be a proper subject for discovery.

**What one side views as the issues is apt
to be fundamentally different from
what the other side thinks they are**

What are materials that are "relevant to disputed facts alleged with particularity in the pleadings" is still ultimately a subjective test. What one side may believe are the "disputed" facts and issues will not necessarily be shared by the other. One party's "key" documents may be viewed by the opposition as harassment and litigation blackmail. And, as discussed below, trying to convince or work out with a client that certain documents are encompassed within the other side's "particular alleged facts" creates a fundamental tension between client and counsel. The present system, where each side asks the other for specific documents, makes it clear what is or is not called for and does not place an attorney in the extremely awkward position of, first, trying to figure out what the other side is really alleging and, second, convincing his or her own client that certain categories of materials must be "disclosed" right off the bat at the beginning of the case.

**"Disclosure" will require continual
updating — both of the pleadings and
of the "disclosures"**

The Advisory Committee notes also seem to contemplate a series of ongoing amendments to the pleadings. Even if the initial pleadings do not call for information about the defendant's dog-kicking proclivities, "as [a party's] investigation continues and as the issues in the pleadings are clarified, it should supplement its disclosures as required by subdivision [26](e)(1)." If one side does not think that what the other wants is framed by the pleadings, all the other side has to do is to amend them and then insist on more "disclosure."

This is hyperbole, but it illustrates the point: the new disclosure rules, although designed in theory to reduce discovery costs, are very likely to lead to new and equally expensive discovery, not to mention pleading, battles.

**There are fundamental ethical
problems with "disclosure"**

For us, there is also the overriding ethical issue. Ours is an adversary, not an inquisitorial, system. Counsel prepare their own cases as advocates. A lawyer should not have to guess what documents, witnesses, etc., the other side might find "likely to bear . . . on any claim or defense." Each side should define for itself what specific materials it wants the other to produce.

The disclosure concept inevitably places a barrier between client and counsel, who is charged by the canons with vigorously representing the client's cause. Given the possibility of heavy sanctions for failing to provide "disclosure," the uncertainty takes on added importance. Instead of addressing particular categories of documents the other side has asked for, each party and its counsel will now have to decide, at the beginning of the case, the meaning of "likely to bear significantly on any claim or defense." The tension between attorney and client is obvious.

As Justice Scalia (joined by Justices Souter and Thomas) stressed in his dissent (attached hereto at tab C) from the Court's adoption of the "disclosure" system:

By placing on lawyers the obligation to disclose information damaging to their clients — on their own initiative, and in a context where the lines between what must be disclosed and what need not be disclosed are not clear but require the exercise of considerable judgment — the new [disclosure] Rule would place intolerable strain upon lawyers' ethical duty to represent their clients and not to assist the other side. Requiring a lawyer to make a judgment as to what information is "relevant to disputed facts" plainly requires him to use his professional skills in the service of the adversary.

**The "disclosure" rules seek to
pretermitt the experimentation called
for by Congress in the Civil Justice
Reform Act of 1990**

There is really no demonstrated need to adopt any form of disclosure. Under the Civil Justice Reform Act of 1990, the district courts across the country are already trying numerous kinds of innovations to see whether they reduce costs and delay to litigants. Some have adopted experimental "disclosure" systems very much like that proposed for Rule 26. Others have concluded that "disclosure" is not appropriate. It does not make sense, and is actually counterproductive, to impose one system of "disclosure" — particularly in the face of overwhelming opposition from all segments of the bar and the public — while these experiments are ongoing and have yet to be assessed.

* * * * *

We therefore respectfully urge Congress to exercise its statutory and inherent powers to reject the proposed "disclosure" system set forth in proposed Federal Rule of Civil Procedure 26(a)(1).

Respectfully submitted,

James K. Archibald
Lawrence J. Fox
William T. Hangle
Loren Kieve
David C. Weiner¹

June 16, 1993

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¹ Mr. Archibald is a member of the Council of the 63,000-member Section of Litigation of the American Bar Association. Mr. Fox is the current nominee for Vice Chair of the Section. Mr. Hangle is the co-chair of the Section's Federal Procedure Committee. Mr. Kieve is the immediate past co-chair of the Federal Procedure Committee, as well as an immediate past member of the ABA's Civil Justice Reform Coordinating Committee; he is currently a member of the District of Columbia Federal District Court Advisory Committee under the Civil Justice Reform Act. Mr. Weiner is the current Vice Chair of the Litigation Section, as well as the Vice Chair of the Civil Justice Reform Act Advisory Committee for the Northern District of Ohio. The views expressed herein are their own, and do not necessarily represent those of the Litigation Section's other members or the ABA.

TAB A

Discovery Reform

BY LOREN KIEVE

There has been almost universal agreement that discovery has become a nightmare. It has provoked local rules limiting discovery, proposals by Vice President Quayle's Council on Competitiveness, and most recently proposals to amend the Federal Rules of Civil Procedure themselves.

A federal district judge, William Schwarzer, who is also currently director of the Federal Judicial Center, has written a thought-provoking article on the subject entitled, "Slaying the Monsters of Cost and Delay: Would Disclosure Be More Effective Than Discovery?" in the December-January '91 issue of *Judicature* magazine.

Schwarzer's proposal, which legal columnist Stuart Taylor has called a "lifeline for [a] system drowning in discovery," calls for mandatory disclosure—requiring both sides to a lawsuit to disclose at the very beginning of a case any material that is "relevant" to the issues.

The disclosure concept has most recently been embraced by the Judicial Conference Advisory Committee on Civil Rules in its August 1991 Preliminary Draft of proposed rule amendments (now being circulated for comment).

In place of the term "relevant" the 1991 draft would require the parties to disclose the names and identities of people, documents, data compilations or tangible things that "are likely to bear significantly on any claim or defense."

In sharp contrast to Judge Schwarzer's original proposal, however, the draft would continue to allow the parties to use the traditional discovery devices—although it would place not terribly restrictive limits on their number and length (15 interrogatories and 10 depositions, no more than six-hours long per side)—unless the parties otherwise agreed or the court directed for good cause.

Although superficially appealing, the disclosure concept is far from a lifeline. It may be more like taking a drowning victim out of one river only to throw her into another.

If discovery is overwhelming litigation (as I and many others believe), then the answer is not a mutated form of discovery—one that requires each party immediately after a lawsuit is filed to guess what documents, etc., the other side might find relevant or that "bear significantly" on the issues (or, to use Taylor's term, are "damaging") and turn them over to the adversary. This simply

would compound the problem by adding confusion to an already overburdened system.

Our legal system is predicated on the curious notion that a lawyer can file a lawsuit with only a bare idea of what the case—much less the trial—will look like, and then require the opposition and its lawyers to go through the cumbersome, expensive procedure of sifting through its files to turn over a vast array of material that is not merely relevant but that may “lead to the discovery” of relevant evidence.

I am in full agreement with Judge Schwarzer's bottom line. The current discovery process is a monster out of control. As Taylor so aptly put it, discovery “devours millions of dollars and countless hours of lawyers' time in cases that would be better settled or tried with far less ado.”

The American Bar Association's 1990 Annual Meeting in Chicago devoted a considerable amount of time to the problem of discovery. Virtually everyone—lawyers, judges, professors and clients—agreed that:

► Discovery has gotten seriously out of hand;

► The Federal Rules of Civil Procedure's promise of the “just, speedy, and inexpensive determination of every action” has become, at best, a hollow incantation and, at worst, a cruel joke; and

► The vaunted benefits of discovery have proven to be largely illusory and not worth the toll they take on litigants and the courts.

Some have suggested cynically that lawyers have glommed onto discovery because it is has become the ideal way to rack up billable hours—with legions of leveraged associates reinventing new forms of multipart interrogatories, and document requests spewing forth from word processors like the multi-headed Hydra of mythology. As soon as one discovery head is cut off, two more appear in its place.

When the other side responds in kind by launching its retaliatory first, second and third waves, the lawyers then can generate even more billables by dispatching another team to sift through every nook and cranny of the client's files. The object is to find the smoking gun the other side just knows has to be there.

Of course, all the while, both sides have to fight about the scope of discovery, privilege, protective orders, the length (and place) of depositions, and so on—generating even more revenue.

The truth is that the system itself is the root evil. Like Mount Everest, a lawyer uses discovery “because it is there.” It is one of the tools (choose your own metaphor—chain saw, axe) the rules give us.

If you know your opponent has this tool, and is going to use it, then you risk 1) loss of the case; 2) a



malpractice suit; and 3) the wrath of your client by not using discovery—either aggressively or defensively.

The proposal to substitute disclosure for discovery hopes to do away with this. It is certainly a step in the right direction, but it does not go far enough, and may actually exacerbate the problem.

The theory behind disclosure is that it will require the parties, at the beginning of a case, to produce all relevant materials and the names of people who may know something about it. The lawyers will then know enough about the case to settle, file a dispositive (or partially dispositive) motion, or go to trial.

If disclosure actually stopped there, it might do some good. But current proposals allow for traditional discovery as well and also contemplate, upon a showing of good cause, even more depositions, interrogatories and document requests—the grist of the traditional discovery mill.

(Given that nature abhors a vacuum, the typical case undoubtedly also will tend to include motions alleging that there is good cause to conduct additional discovery.)

The twin premises underlying the disclosure model are that it will require federal trial judges to take a more active role in managing their cases and substantially reduce dis-

covery battles. If a party is unsure of what it should disclose, it will file a motion to clarify its obligation, and the judge will take charge.

This all but guarantees the same kind (if not more) of the motion practice that now permeates our oldfangled discovery system—but shifts it right up front.

Both sides (and their counsel) undoubtedly will have very different views of what the subject matter of the case may be. One side's substantial constitutional issues will be another's frivolous blackmail.

That is why discovery rules now require the requesting party to identify the specific items or realms of information it wants, and why court intervention is often required to decide, in concrete terms, what kinds of documents have to be searched for and produced, and what do not.

Trial counsel have a duty to guide their clients in making a good-faith discovery search. But there is a major difference between telling the client to look for these kinds of documents or look in these files, and trying to tell the client to look for documents relating to the subject matter of the case. No lawyer should be placed in the position of being second-guessed or sanctioned for making the wrong cut on what the client should search for.

Federal trial judges are for the most part extremely busy and do not have the time (assuming they have the inclination) to supervise disclosure any more than they have had the time to supervise discovery.

The judges in the Southern or Western District of Texas (and in many other districts), for example, cannot possibly manage their civil cases this way. They are spending 10, 12 and more hours a day trying to process the never-ending torrents of criminal cases that come in each week between the increasing Scylla of mandatory minimum sentences and the Charybdis of more categories of crimes being enacted by Congress each year. (The recent proposed bill making it a federal offense to commit a crime using a gun transported in interstate commerce literally would have flooded the federal courts.)

The federal judges I have spoken to think that the suggested solution to their civil (not to mention criminal) caseload is a more active or hands-on role is, well, funny.

To abuse Taylor's metaphor, if the ship of litigation is not to sink in its own ocean of paper, motions and

the other ancillary flotsam and jetsam of discovery (or its practical equivalent, disclosure), then strong medicine is required.

The obvious solution is one the rest of the civilized world (or at least the English and civil law systems) has long used: No discovery.

Lawyers in England and on the Continent investigate the case before it is filed (presumably trying all the while to settle it), obtain the documents and witnesses they need to try it, and, only then, file a lawsuit. At that point they are ready to try it.

Once the suit is filed, preliminary pleadings are filed to see if the case has legal merit. If it passes this test, a trial date is set. Before trial, the parties exchange lists of witnesses and a short statement of what they will say, and turn over copies of the exhibits they plan to use. Then they go to trial. If a witness is unavailable because he is in another jurisdiction or on his deathbed, then his deposition can be taken, but this is the only exception.

Not only do lawyers in England and Europe do this every day, so do U.S. criminal defense lawyers and those who try arbitrations.

I know of no empirical study or scientific proof that suggests that this produces a result that is less fair. Nor do I know of any study or proof to indicate that our unique, over-burdened system is better.

I do know, though, that there are very few actual litigants—those who have been through the crucible of American discovery—who think that our discovery system is worth the time and expense it has engendered.

There may be a few smoking guns (more likely, water pistols) that are not unearthed, and perhaps even a few truly meritorious suits that do not succeed. But it is extremely doubtful that these few exceptions justify the overwhelming burdens and abuses wrought by our current system of pretrial practice and discovery.

I also doubt—notwithstanding Judge Schwarzer's inference and Taylor's explicit charge that lawyers would oppose discovery reform because "it would deliver a major hit to the revenue base of large law firms"—that there are many lawyers who think that the present

system does not need reform.

Eliminating discovery entirely would streamline cases and require lawyers and clients to think seriously about the merits of a suit before filing or defending one. (Requiring the losing side to pay the other's attorneys' fees and expenses also might go a long way toward reducing our overloaded civil litigation, but that is a different, although related, subject.)

There may be a few types of cases where some limited discovery would be appropriate because of the nature of the issues—employment discrimination, for example, where the plaintiff needs to have access to the employer's statistical employment information—but these should be a narrow exception.

Doing away with discovery probably would require pleading with greater particularity than under the current (but not terribly informative) system of notice pleading—where, for example, a lawyer only has to allege that one of three defendants, or perhaps all three, negligently drove or caused to be driven a motor vehicle against plaintiff to state a claim. But more particularly certainly would help frame the issues better and might

pretrial conference (normally a month or so after the discovery cut-off date) are automatically set in every case. They can be extended only for good cause (and never merely by agreement of counsel). Trial is set within three to eight weeks of the final pretrial conference. The judges operate on a master calendar, so if one judge is not available, another will try the case.

Unless they obtain a court order based on good cause, the parties are limited to 30 interrogatories—including subparts—and five depositions of non-parties. Objections to discovery must be made within 15 days. And the parties are required to consult in good faith before filing any motion.

Motions are noticed to the nearest Friday, when all of the judges sit to hear both criminal and civil motions. Most motions are decided from the bench; those that are not usually come down the following week. Written decisions are typically not very long, but the parties know why the court has ruled the way it has.

More importantly, they obtain a result that moves them toward trial, or disposes of the case entirely. And how many lawyers can hon-

The great experiment of discovery is demonstrably an abject failure. It should be eliminated, period.

even eliminate meritless cases early on.

I have tried cases under both the American and English systems, and have concluded that the U.S. discovery system is not worth it.

The great experiment of discovery—and the notion that it would allow a fairer trial at less expense to the litigants—is demonstrably an abject failure. It should be eliminated, period, and not replaced by another system that does not solve the problem, and may compound it.

If discovery is not simply abolished, then it has to be severely truncated, both in scope and in the time it takes. The Eastern District of Virginia—the "rocket docket"—has such a system. It is not as good as no discovery, but it is certainly better than what exists in most courts today.

Firm discovery deadlines (usually in the three- to four-month range) and firm dates for a final

estly say that their case was hurt because they did not get a crack at a particular document, or could not take seven more depositions?

Lawyers who practice in the Eastern District of Virginia know that they have to be ready to go to trial. More than 90 percent of all civil cases, however, settle. The judges I have spoken to are unanimous that the way to make sure cases settle earlier is to have firm deadlines, both for discovery and for trial. That is why the Eastern District of Virginia has among the highest and fastest disposition rates of any federal trial court.

Judge Schwarzer's thoughtful proposal takes aim at a serious problem. But based on the experience of other trial lawyers and judges I have spoken to, it does not go far enough, and simply adds another monster to the rest of those that inhabit the nether regions of darkness and waste we know as pretrial discovery. ■

TAB B

COMMENTS OF THEODORE R. TETZLAFF
CHAIR, SECTION OF LITIGATION,
AMERICAN BAR ASSOCIATION
ON THE
AUGUST 1991 PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF CIVIL PROCEDURE
AND THE
FEDERAL RULES OF EVIDENCE

Date: February 7, 1992

Disclosure

The concept of disclosure, which forms the basis for the most significant change to the discovery process considered to date, raises a number of significant practical and philosophical problems that must be resolved before a mandatory disclosed system of discovery is required in every federal district court. While the Litigation Section supports the early, voluntary disclosure of certain information (particularly the names and addresses of persons having knowledge and the location of documents most relevant to the case), the Section has grave concerns, for the reasons that are summarized below, regarding the feasibility of the disclosure model incorporated in the current proposals.

First, the standard for initial disclosures contained in Proposed Rule 26(a)(1) - information "that bears significantly [or is "likely to bear significantly"] on any claim or defense" is both highly subjective and different from the current standard of Rule 26 permitting discovery that is relevant to the subject matter or reasonably calculated to lead to the discovery of admissible evidence. As a practical matter, this means that each party about to make its mandatory initial disclosures will know two things - first, that it need not disclose all discoverable material, and second, that it will be making its determination of what should be disclosed before it knows what its adversary will be disclosing. We submit that this will, at least for the initial period of several years when the standard is tested and clarified in specific cases, lead to disclosures that are more limited than what the drafters expected. These initial disclosures will therefore be less helpful in narrowing future discovery, while that discovery is subjected to presumptive numerical limitations that are imposed by other rules changes that are proposed on the assumption that there will be full initial disclosures.

Second, in a notice-pleading system, what is likely to "bear significantly" on a defense is not all clear when the defendant answers the complaint, which is thirty days before the disclosures are required to be made. While we believe that any disclosure system that eventually is implemented should require simultaneous early exchanges, the danger is that the defendant will narrowly construe the requirement, and that the plaintiff may consequently be disadvantaged by the other limits proposed on the number and length of depositions and interrogatories.

Third, there is a major difference between a lawyer telling her client to look for specific documents covered by the adverse party's document request or interrogatories, and telling the client to look for documents "that are likely to bear significantly on any claim or defense." That standard may well complicate, rather than simplify, discovery in cases such as product liability cases that proceed under multiple and divergent legal theories.

Fourth, there is a fundamental philosophical problem posed by engrafting a disclosure system onto the body of an adversary system of justice which is likely to reject it as fundamentally incompatible tissue. The disclosure proposal could simply inject another layer of uncertainty -- and therefore potential for dispute and more pretrial maneuvering -- into the arena. See generally Kieve, Discovery Reform: Maybe the Best Solution Is No Discovery At All, ABA Journal (Dec. 1991). See also, Kieve, "An Alternative Proposal," Appendix 3.

While these problems do not necessarily require rejection of any disclosure-based system, they caution against a rush to mandating such a system nationally before there is a useful body of empirical evidence as to whether, or under what circumstances, such a system can work both justly and efficiently. Fortunately, there are laboratories in which such empirical data will be generated in the next two years, in the form of the pilot and early implementation district courts which have implemented variants of a disclosure-based discovery system as part of their Civil Justice Reform Act "civil justice expense and delay reduction plans." Given the problems posed by a disclosure-based discovery system, we believe that the proposals for initial disclosures contained in Proposed Rule 26(a)(1) should be withdrawn at this time, and reevaluated in two years in light of the experience of the pilot districts.

TAB C

SUPREME COURT OF THE UNITED STATES

AMENDMENTS TO THE FEDERAL RULES
OF CIVIL PROCEDURE

[April 22, 1993]

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, and with whom JUSTICE SOUTER joins as to Part II, filed a dissenting statement.

I dissent from the Court's adoption of the amendments to Federal Rules of Civil Procedure 11 (relating to sanctions for frivolous litigation), and 26, 30, 31, 33, and 37 (relating to discovery). In my view, the sanctions proposal will eliminate a significant and necessary deterrent to frivolous litigation; and the discovery proposal will increase litigation costs, burden the district courts, and, perhaps worst of all, introduce into the trial process an element that is contrary to the nature of our adversary system.

* * * *

RULES OF CIVIL PROCEDURE

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II

Discovery Rules

The proposed radical reforms to the discovery process are potentially disastrous and certainly premature—particularly the imposition on litigants of a continuing duty to disclose to opposing counsel, without awaiting any request, various information “relevant to disputed facts alleged with particularity.” See Proposed Rule 26(a)(1)(A), (a)(1)(B), (e)(1). This proposal is promoted as a means of reducing the unnecessary expense and delay that occur in the present discovery regime. But the duty-to-disclose regime does not replace the current, much-criticized discovery process; rather, it *adds a further layer of discovery*. It will likely *increase* the discovery burdens on district judges, as parties litigate about what is “relevant” to “disputed facts,” whether those facts have been alleged with sufficient particularity, whether the opposing side has adequately disclosed the required information, and whether it has fulfilled its continuing obligation to supplement the initial disclosure. Documents will be produced that turn out to be irrelevant to the litigation, because of the early inception of the duty to disclose and the severe penalties on a party who fails to disgorge in a manner consistent with the duty. See Proposed Rule 37(c) (prohib-

¹ I do not disagree with the proposal to make law firms liable for an attorney's misconduct under the Rule, see Proposed Rule 11(c), or with the proposal that Rule 11 sanctions be applied when claims in pleadings that at one time were not in violation of the rule are pursued after it is evident that they lack support, see Proposed Rule 11(b); Advisory Committee Notes to Proposed Rule 11, p. 51.

It is curious that the proposed rule regarding sanctions for discovery abuses *requires* sanctions, and specifically recommends financial sanctions and compensation to the moving party. See Proposed Rule 37(a)(4)(A), (c)(1). No explanation for the inconsistency is given.

RULES OF CIVIL PROCEDURE

iting, in some circumstances, use of witnesses or information not voluntarily disclosed pursuant to the disclosure duty, and authorizing divulgement to the jury of the failure to disclose).

The proposed new regime does not fit comfortably within the American judicial system, which relies on adversarial litigation to develop the facts before a neutral decisionmaker. By placing upon lawyers the obligation to disclose information damaging to their clients—on their own initiative, and in a context where the lines between what must be disclosed and what need not be disclosed are not clear but require the exercise of considerable judgment—the new Rule would place intolerable strain upon lawyers' ethical duty to represent their clients and not to assist the opposing side. Requiring a lawyer to make a judgment as to what information is "relevant to disputed facts" plainly requires him to use his professional skills in the service of the adversary. See Advisory Committee Notes to Proposed Rule 26, p. 96.

It seems to me most imprudent to embrace such a radical alteration that has not, as the advisory committee notes, see *id.*, at 94, been subjected to any significant testing on a local level. Two early proponents of the duty-to-disclose regime (both of whom had substantial roles in the development of the proposed rule—one as Director of the Federal Judicial Center and one as a member of the advisory committee) at one time noted the need for such study prior to adoption of a national rule. Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. Pitt. L. Rev. 703, 723 (1989); Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 Vand. L. Rev. 1295, 1361 (1978). More importantly, Congress itself reached the same conclusion that local experiments to reduce discovery costs and abuse are essential *before* major revision, and in the Civil Justice Reform Act of 1990, Pub. L. 101-650, §§ 104, 105, 104 Stat. 5097-5098, mandated an extensive pilot program for district courts. See also 28 U. S. C. §§ 471, 473(a)(2)(C). Under that legislation, short-term experi-

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ments relating to discovery and case management are to last at least three years, and the Judicial Conference is to report the results of these experiments to Congress, along with recommendations, by the end of 1995. Pub. L. 101-650, § 105, 104 Stat. 5097-5098. Apparently, the advisory committee considered this timetable schedule too prolonged, see Advisory Committee Notes to Proposed Rule 26, p. 95, preferring instead to subject the entire federal judicial system at once to an extreme, costly, and essentially untested revision of a major component of civil litigation. That seems to me unwise. Any major reform of the discovery rules should await completion of the pilot programs authorized by Congress, especially since courts already have substantial discretion to control discovery.² See Fed. Rule Civ. Proc. 26.

I am also concerned that this revision has been recommended in the face of nearly universal criticism from every conceivable sector of our judicial system, including judges, practitioners, litigants, academics, public interest groups, and national, state and local bar and professional associations. See generally Bell, Varner, & Gottschalk, *Automatic Disclosure in Discovery—The Rush to Reform*, 27 Ga. L. Rev. 1, 28-32, and nn. 107-121 (1992). Indeed, after the proposed rule in essentially its present form was published to comply with the notice-and-comment requirement of 28 U. S. C. § 2071(b), public criticism was so severe that the advisory committee announced abandonment of its duty-to-disclose regime (in favor of limited pilot experiments), but then, without further public comment or explanation, decided six weeks later to recommend the rule. 27 Ga. L. Rev., at 35.

* * *

Constant reform of the federal rules to correct emerging

²For the same reason, the proposed presumptive limits on depositions and interrogatories, see Proposed Rules 30, 31, and 33, should not be implemented.

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problems is essential. JUSTICE WHITE observes that Justice Douglas, who in earlier years on the Court had been wont to note his disagreements with proposed changes, generally abstained from doing so later on, acknowledging that his expertise had grown stale. *Ante*, at 5. Never having specialized in trial practice, I began at the level of expertise (and of acquiescence in others' proposals) with which Justice Douglas ended. Both categories of revision on which I remark today, however, seem to me not matters of expert detail, but rise to the level of principle and purpose that even Justice Douglas in his later years continued to address. It takes no expert to know that a measure which eliminates rather than strengthens a deterrent to frivolous litigation is not what the times demand; and that a breathtakingly novel revision of discovery practice should not be adopted nationwide without a trial run.

In the respects described, I dissent from the Court's order.

APPENDIX 5.—STATEMENT OF THE AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, SECURITIES INDUSTRY ASSOCIATION, ALLIANCE OF AMERICAN INSURERS, AMERICAN INSURANCE ASSOCIATION, NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, AETNA LIFE AND CASUALTY INSURANCE CO., ALLSTATE INSURANCE CO., KEMPER NATIONAL INSURANCE CO., NETHERLANDS INSURANCE CO., AND STATE FARM INSURANCE CO., JUNE 16, 1993

SUBCOMMITTEE ON INTELLECTUAL PROPERTY
AND THE ADMINISTRATION OF JUSTICE

COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

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HEARING ON PROPOSED AMENDMENTS TO
THE FEDERAL RULES OF CIVIL PROCEDURE
June 16, 1993

INTRODUCTION AND SUMMARY OF STATEMENT

As frequent parties to lawsuits in federal courts, the members of the insurance, accounting and securities communities joining in this statement have a significant stake in changes that would reduce unnecessary expense and delay in civil cases. We are the ones who pay the expenses associated with unnecessary and burdensome procedures, and we are constantly searching for ways to make litigation fairer and more efficient. We applaud the Judicial Conference for the time and attention devoted to studying these problems and we support many of the proposed amendments because they will advance our shared goals. Nevertheless, we are profoundly troubled by the proposal to amend Federal Rule of Civil Procedure 26(a)(1), and for the reasons set forth below, we urge that Congress act affirmatively to strike that proposal before it goes into effect on December 1 of this year.

The proposed amendment to Rule 26(a)(1) would create a new, self-executing and continuing requirement for parties to identify all documents and witnesses relevant to the facts alleged in a complaint and other pleadings. The new rule would require automatic, early disclosure -- without any requirement of a discovery request from the opposing party -- of all witnesses and

documentary evidence in the possession of either party that is "relevant to disputed facts alleged with particularity in the pleadings." The rule would also require parties to exchange automatically information concerning damages and insurance coverage. Pursuant to proposed Rule 37(c), any party that fails to disclose the information required by proposed Rule 26(a) will be prohibited from introducing witnesses or information it failed to disclose during "discovery" as evidence in any trial, hearing or motion, unless its failure to disclose was harmless.

We are opposed to proposed Rule 26(a)(1) because it seeks to impose a radical revision to civil discovery which most observers believe will increase, not decrease, the costs and inefficiency of litigation and which will create serious new risks and issues for litigants. It will create disputes over the sufficiency of disclosure and the necessity for court-imposed sanctions, adding an additional layer of discovery disputes and encouraging costly over-disclosure of unnecessary and/or irrelevant information. By imposing a duty to disclose information to one's adversary, automatically and on an ongoing basis, the proposed amendment in effect requires litigants to invest time, money and personnel resources in the service of their adversaries. It also threatens the most fundamental

elements of our adversary system -- the lawyer's duty of loyalty, the lawyer's duty to zealously represent one's client and the attorney-client privilege. Most strikingly, it would do all of this without awaiting the results of the civil justice reform experiments that Congress mandated in 1990 under the Civil Justice Reform Act ("CJRA").

In the CJRA, Congress mandated a process of trial and error and evaluation in the local district courts, to permit experimentation with a wide variety of ideas for improving the handling of civil suits based upon input from all "users" of the civil justice system. The period of local experimentation mandated by the CJRA is now underway. Thirty-eight districts already have CJRA plans in place; the remaining districts will have their plans in place by December 1, 1993. Pursuant to the statute, two separate empirical studies will be conducted on the data generated by these experiments. The results of these studies will be submitted to Congress by December 31, 1995.

As the first thirty-four plans indicate, local CJRA plans will reflect a diversity of approaches to discovery reform, including different variations of mandatory disclosure. Almost forty percent of districts so far have not even included any form of mandatory disclosure in their plans. The vast majority of the

districts have chosen not to experiment with a disclosure rule as sweeping as Rule 26(a)(1) would mandate, most apparently believing that other approaches to litigation reform hold more promise. Some districts are experimenting with rules similar to Rule 26(a)(1), so information will be gathered on its efficacy and how it stacks up against other approaches to reform.

Rule 26(a)(1) jumps the gun on this process, pushes aside the experimentation process, and fundamentally alters established discovery procedures in an extremely controversial manner. It cannot help but undermine the CJRA effort as the courts and litigants struggle to interpret and implement the new national mandate.

It would be one thing if the Rule's merits were clear and convincing. But, instead, a wide spectrum of organizations have expressed overwhelming opposition because of serious concerns about the negative impact that the rule will have on civil litigation. Moreover, the process by which Rule 26(a)(1) arrived at Congress -- with the Judicial Conference's Advisory Committee first proposing it, then deleting it in the face of the overwhelming opposition, then restoring it in a slightly revised form and sending it on without further opportunity for public comment, and the unusual response it engendered from the United States Supreme Court --

also counsels against this premature fundamental revision in civil litigation.

The proposed weakening of Rule 11, which now provides some protection against unsubstantiated claims, exacerbates the Rule 26(a)(1) problem by cutting back on the tools available for discouraging wasteful and expensive litigation of frivolous claims. We share the concerns addressed more fully in the testimony of the American Insurance Association (AIA).

I. RULE 26(a)(1) UNJUSTIFIABLY JUMPS THE GUN ON THE PROCESS MANDATED BY THE CIVIL JUSTICE REFORM ACT OF 1990.

When Congress enacted the Civil Justice Reform Act of 1990¹, just three years ago, it recognized that the "solutions to problems of cost and delay must include significant contributions by the courts, the litigants, the litigants' attorneys, and by the Congress and the executive branch."² Congress also recognized that, in order to be successful, civil justice reform would require a trial and error approach conducted at the local level with local input about local problems and needs.³

¹ Pub. L. No. 101-650, tit. I, 28 U.S.C. §§ 471-482.

² Pub. L. No. 101-650, § 102(3).

³ Justices Scalia, Thomas and Souter (in their opinion
[Footnote continued on next page]

On its face, the current effort to impose a sweeping form of mandatory disclosure without awaiting the outcome of the process of local experimentation is "potentially disastrous and certainly premature."⁴ Congress mandated not one, but two, comprehensive and searching empirical studies of the effectiveness of civil cost and delay reduction techniques. The experiments include various combinations of discovery reform, including variations on the mandatory disclosure requirement. Congress should await the outcome of these studies and evaluate them critically before imposing as the national rule this highly controversial, untested, fundamental change in civil litigation.

A. Congress Mandated a 5-Year Period of Experimentation With Discovery Reforms in the Civil Justice Reform Act of 1990.

When Congress enacted the CJRA in 1990, it mandated a series of steps designed to encourage a variety of experimentation and study at the local

[Footnote continued from previous page]
objecting to the new mandatory disclosure rule, see below) similarly opined that "local experiments to reduce discovery costs and abuse are essential before major revision" Order and Memorandum Transmitting Amendments to the Federal Rules of Civil Procedure to the Congress, April 22, 1993, at 5 (Scalia, J., dissenting) (joined in relevant part by Thomas, J. and Souter, J.) (hereinafter "Statement of Justice Scalia") (emphasis in original).

⁴ Statement of Justice Scalia at 4.

district court level of ways to improve the civil litigation process. First, it required every federal district court across the country to implement experimental reform plans designed to eliminate the abuse, expense and delay that have been cited as problems with the present civil justice system. Pursuant to the CJRA, each district must develop a reform plan in consultation with an advisory group comprised of local practitioners and local litigants. A central purpose of each reform plan is to assess new, streamlined approaches to the discovery process. In addition, districts are encouraged to consider increased use of case management techniques and increased use of alternative dispute resolution. All districts will have plans in place by, ironically, the same date as the new Rule 26(a)(1) will go into effect absent Congressional action -- December 1 of this year. The results of these reform plans are to be evaluated and presented to Congress by the end of 1994.⁵

In addition to the general requirement that each district implement a reform plan, the CJRA established ten "pilot districts" that were required to implement reform plans by December 31, 1991.⁶ After three years,

⁵ 28 U.S.C. §479.

⁶ The statute required these pilot districts to apply
[Footnote continued on next page]

the results of these pilot programs will be evaluated by "an independent organization with expertise in federal court management . . . [which will] compare those results to the impact on costs and delays in 10 other districts, and prepare a report."⁷ At that point, the Judicial Conference is also to submit a report to Congress, recommending either expansion of the pilot program or alternative, more cost effective programs to reduce waste and delay in civil litigation, and the Conference is to proceed to implement its preferred approach through the Rules Enabling Act process.⁸

In addition to the ten pilot programs, the CJRA established a demonstration program under which it required five additional district courts to conduct specific procedural experiments.⁹ The Federal Judicial Center and the Administrative Office of the United States Courts will collect and analyze empirical data from these demonstration districts. The Judicial

[Footnote continued from previous page]
specific principles and guidelines of litigation management, many of which related to alternative discovery reforms. See 28 U.S.C. § 473(a).

⁷ 136 Cong. Rec. S17575 (daily ed. Oct. 27, 1990) (statement of Senator Biden). The independent organization selected to evaluate the effectiveness of the pilot programs is the Rand Corporation.

⁸ Id.

⁹ Pub. L. No. 101-650, § 104.

Conference must report the results of the pilot programs and the demonstration programs to Congress by December 31, 1995.¹⁰

B. Both The House And The Senate Endorsed the Process of Local Experimentation With Controversial New Techniques For Streamlining Civil Litigation.

Congress enacted the CJRA with overwhelming, bipartisan support in both the House and the Senate. It grew out of ideas developed by a task force that Senator Joseph Biden commissioned in 1988 to recommend ways of alleviating excessive costs and delay in the civil justice system. The Brookings Institution and the Foundation for Change convened that task force, and it consisted of well-respected attorneys from the plaintiffs' and defendants' bars, civil rights and women's rights lawyers, attorneys representing consumer and environmental organizations, representatives of the insurance industry, general counsels of major corporations, former judges and law professors.¹¹

The Task Force published a report entitled: Justice For All -- Reducing Costs and Delay in Civil

¹⁰ Pub. L. No. 101-650, § 104(d).

¹¹ A list of Task Force members is attached as Exhibit 1.

Litigation¹² (hereinafter "Brookings Task Force Report"). This report contained twelve procedural recommendations for improving the federal civil justice system. The cornerstone was the development by each district court of a "Civil Justice Reform Plan," developed with assistance from its local bar.¹³ The Task Force reviewed a wide variety of reform proposals and ultimately selected the district-by-district civil justice reform plan mechanism as the most effective way to reduce the costs and delays in the civil justice system. In the Task Force's view, individual courts, in consultation with local users of the federal court system, would be in the best position to assess the causes of excessive costs and delays in a particular district and to craft a reform plan that addressed those problems.

The House Judiciary Committee strongly supported the Task Force's district-by-district approach as embodied in the CJRA. As the House Report said, "Simply stated, it is those who use and run the courts in any given district that are in the best position to address

¹² Reprinted in The Civil Justice Reform Act of 1990 and the Judicial Improvements Act of 1990: Hearings on S. 2027 and S. 2648 Before the Senate Committee on the Judiciary, S. Hrg. 1097, 101st Cong., 2d Sess. 421 (1990) (hereinafter "Senate Hearings").

¹³ Brookings Task Force Report at 19-20, Senate Hearings at 445-46.

the case management needs of that district."¹⁴ The Judiciary Committee indicated that the district plan mechanism was intended to redress, among other things, excessive costs and delays in discovery. "[T]here is a compelling need to control discovery and its attendant costs. Several districts have developed successful techniques for controlling discovery, and it is the intent of the Committee, through this legislation, to encourage such techniques."¹⁵ The full House expressed its support by passing CJRA under suspension of the rules.¹⁶

The Senate likewise strongly supported the district court plan mechanism. According to the Senate Judiciary Committee, which approved the bill 12-1, these plans are the best way to utilize the expertise that has developed in individual districts and to tailor reform plans to the problems of particular venues.

There are a remarkable number of gifted and talented judges, magistrates, clerks, and administrators in the Federal court system. . . . Prior to this legislation, there was no adequate means of drawing upon these resources in every district court. Now there is a means of doing so. There is a basis for extending nationally the ideas that

¹⁴ H.R. Rep. No. 732, 101st Cong., 2d Sess. 10 (1990).

¹⁵ House Report at 10.

¹⁶ 136 Cong. Rec. H13316 (daily ed. Oct. 27, 1990).

have been developed and will continue to be developed at the local level.¹⁷

The Committee viewed participation by local advisory groups as key to the development of effective plans, recognizing that reforms which enjoy broad-based support from the local bench, bar and other users of the civil justice system are more likely to succeed than major changes imposed without such support.¹⁸ We believe this is certainly true for as radical a change as mandatory disclosure.

C. The CJRA Plans Already in Place Have Adopted a Variety of Discovery Reforms; Mandatory Disclosure Is Only One of the Reform Ideas that District Courts Are Trying, And Few Have Decided That Sweeping Disclosure Of The Type Proposed As The National Rule Here Should Even Be Part Of Their Experimental Plans.

To date, thirty-eight of the nation's ninety-four districts have implemented a CJRA plan.¹⁹ The plans already in place have taken a variety of approaches to reforming or streamlining the process of discovery. Few incorporate a rule of the dimensions of Rule 26(a)(1).

¹⁷ S. Rep. No. 416, 101st Cong., 2d Sess. 15 (1990).

¹⁸ Senate Report at 15.

¹⁹ As described above (p. 3), the remaining fifty-six districts are required to commence such plans by December 1, 1993.

Comprehensive information about all CJRA plans implemented before December 31, 1991, 34 districts in all, is available in two publications -- a 1992 report of the ABA's Litigation Section²⁰ and a 1992 report prepared by the Judicial Conference of the United States.²¹ Significantly, almost forty percent of these districts have not chosen any mandatory disclosure requirement as part of their reforms. Moreover, of the twenty-one districts that have adopted some form of mandatory disclosure, only seven appear to require disclosure as broad in scope and as far-reaching as the proposed amendment to Rule 26(a)(1).²² Apparently, the trial judges and advisory groups, acting under the CJRA, have not regarded mandatory disclosure, as proposed in Rule 26(a)(1), as the clear solution to the problems with civil litigation in the federal courts.

²⁰ Section of Litigation, American Bar Association, Report of The Task Force on the Civil Justice Reform Act (July 1992) (hereinafter "ABA Report").

²¹ Judicial Conference of the United States, Civil Justice Reform Act Report: Development and Implementation of Plans by Early Implementation Districts and Pilot Courts (June 1, 1992) (hereinafter "Judicial Conference Report").

²² A chart summarizing the mandatory disclosure provisions that the twenty-one districts have adopted is attached to this statement as Exhibit 2.

1. Document Disclosure

In the twenty-one districts that have mandatory disclosure requirements, the nature of the document disclosure requirement varies widely. Some courts have limited their mandatory disclosure rules to certain types of cases, such as expedited cases or pro se prisoner cases (S.D.N.Y.)²³ or personal injury, medical malpractice, employment discrimination, or civil RICO cases (D. Del.). In addition, the courts have defined in a variety of ways the subject matters covered by the document disclosure requirement. For instance, the Northern District of California limits its document disclosure rule to documents that tend to support the disclosing party's position. Even within districts, there is variation in the approach to document disclosure.²⁴

²³ According to the ABA Report, the Southern District of New York limits this disclosure requirement to expedited cases, while the Judicial Conference Report says the District imposes "standardized discovery" only in pro se prisoner cases.

²⁴ For example, according to the ABA Report, in the Northern District of Indiana, only one judge has established a document disclosure requirement. The Judicial Conference Report indicates that the District has established three different experiments, involving different judges, each requiring different degrees of disclosure.

2. Identification of Potential Witnesses

The ABA Report indicates that, of the twenty-one districts with mandatory disclosure provisions, only about half require any disclosure regarding potential witnesses. Again, even among those requiring some disclosure, there is wide variation as to what needs to be disclosed and when. There are limitations as to the types of cases in which disclosure is required, and there are limitations on the extent of disclosure required. Few provisions are as sweeping as the proposed Rule 26(a)(1).

3. Other Areas of Disclosure

In the other (and less controversial) areas of disclosure covered by Rule 26(a)(1), the districts have also taken divergent approaches. In contrast to proposed Rule 26(a)(1), only seven of the twenty-one plans with disclosure requirements specifically mandate new disclosures regarding expert witnesses, and only five of the plans specifically require new disclosures of information relevant to damages computation. Indeed, none of the districts reported on in the ABA Report has a mandatory disclosure requirement as sweeping as Rule 26(a)(1) when considered in its entirety.

4. The Plans In Place In The Home States Of
The Subcommittee Members Demonstrate The
Variety Of Approaches To Disclosure Being
Tried Under The CJRA.

The variety of experimentation under the CJRA in these controversial areas is apparent just by examining the district courts in states represented by members of this Subcommittee.²⁵ For instance, the United States District Court for the District of New Jersey has not included mandatory disclosure of any form in its plan. According to the Judicial Conference Report, the Eastern District of Wisconsin's plan mandates only the use of standard interrogatories²⁶ while the Western District of Wisconsin's plan requires only disclosure of expert witnesses at a preliminary pretrial conference. The Southern District of New York has developed mandatory disclosure requirements that only apply in limited categories of cases. That court's plan apparently does not require broad identification of potential witnesses or information regarding expert witnesses.

The federal district courts in California have taken varying approaches to discovery reform. The

²⁵ A chart summarizing the approach to mandatory disclosure in the districts in the states that the Subcommittee members represent is attached to this statement as Exhibit 3.

²⁶ The plan exempts "simple cases" from the use of mandatory interrogatories.

Eastern District of California's plan has no mandatory disclosure requirement. Likewise, the Southern District of California has adopted no new disclosure provisions. The plan in place for the Northern District of California requires mandatory disclosure of all persons known to have discoverable information about factual matters and all unprivileged documents in the party's control that tend to support the positions that the disclosing party has taken or is reasonably likely to take in the case. Even that limited requirement does not apply to cases before all judges or to all types of cases.²⁷

* * *

The actual experience with the implementation of the CJRA confirms what the statute itself and its legislative history suggests: The opportunity to develop local plans produces a variety of ideas and approaches. Most importantly for the present discussion, those plans do not reflect, by a long shot, universal acceptance of mandatory disclosure, let alone disclosure as sweeping as that required by Rule

²⁷ Neither report discusses the Central District of California because that district had not adopted a plan at the time the reports were drafted.

26(a)(1). Under these circumstances, there is no basis to proceed to adopt Rule 26(a)(1) as the new national standard.²⁸

II. THE PROPOSED DISCLOSURE REQUIREMENT WILL NOT
STREAMLINE LITIGATION, BUT WILL INCREASE COSTS
AND CREATE NEW RISKS AND DILEMMAS FOR LITIGANTS.

If the case had been clearly made that mandatory disclosure as written into Rule 26(a)(1) would streamline discovery, there might be a basis for ignoring the CJRA process and proceeding directly to national reform. But, to the contrary, virtually everyone who has looked at this provision has found it seriously wanting. Indeed, of the 208 comments

²⁸ Those tracking the CJRA experiments report that it is too early in the process to evaluate the effectiveness of the various plans. Even the ones put in place in 1992 have had little time to take effect, particularly in light of the various time periods after a case is filed before certain of the new requirements are triggered. It is our understanding that little information is expected to be available before 1994.

However, a recent survey of attorneys in Maricopa County, Arizona, which has been experimenting for over a year with a disclosure requirement similar to Rule 26(a)(1), seems to confirm the nature of its defects. Those attorneys reported overwhelmingly that disclosure has increased the costs of litigation, chilled the willingness of clients to disclose information to their own counsel, and interfered with the attorney work product and attorney/client communication privileges, and has not led to earlier disposition of cases nor reduced unnecessarily adversarial conduct or "litigation by ambush" techniques. See Attorneys Doubt Zlaket Rules, Agree with Some at March Hearing, Maricopa Lawyer, April, 1993, at 1.

submitted to the Advisory Committee of the Judicial Conference in response to the original mandatory disclosure requirement, 95% opposed the new rule. Moreover, the Advisory Committee withdrew that proposal in the face of that criticism, and it looked at first like the proposed amendments would move forward without the controversial mandatory disclosure provision. But the Advisory Committee later suddenly reversed itself, inserted a slightly revised mandatory disclosure provision, and approved it without allowing any further opportunity for public comment.

Unfortunately, despite the Judicial Conference's good intentions, serious problems with the provision remain.

A. Rule 26(a)(1) Will Increase Discovery Disputes, Complexity, And Costs.

Most importantly from our point of view as parties paying the high costs of litigation, the provision will likely only increase costs and increase complexity, not alleviate it.

We have the strongest interest in reducing the costs and the delays associated with civil litigation. We have everything to gain from discovery reforms that would truly streamline the civil litigation process, eliminate delays and decrease costs. However, we firmly

believe, as do most other observers, that Rule 26(a)(1) will not accomplish any of those goals. Rather, the proposed disclosure requirement simply adds an additional layer of discovery and will lead to satellite litigation concerning the sufficiency of disclosure and the necessity for court-imposed sanctions. Because of the risk of serious sanctions for misreading the new obligation, there will be a strong inclination for parties to battle out the application of the new requirement through motions practice early in litigation, without any obvious diminution of other discovery requests and fights. Parties may also take the route of over-disclosure to avoid risking violation of the vague standard that Rule 26(a)(1) would impose. All of this means simply more delays and more costs for us.

Indeed, Justice Scalia (joined by Justices Thomas and Souter) noted this irony, that the proposed Rule 26(a)(1)

will likely increase the discovery burdens on district judges, as parties litigate about what is 'relevant' to 'disputed facts,' whether those facts have been alleged with sufficient particularity, whether the opposing side has adequately disclosed the required information, and whether it has fulfilled its continuing obligation to supplement the initial disclosure. Documents will be produced that turn out to be irrelevant to the litigation, because of the early inception of the

duty to disclose and the severe penalties on a party who fails to disgorge in a manner consistent with the duty.²⁹

- B. Rule 26(a)(1) Also Creates New Risks For Litigants By Radically Altering Long-Standing Concepts Of Parties' Obligations In Civil Litigation And Of The Attorney-Client Relationship.

The proposed rule, which imposes a duty to disclose automatically and on an ongoing basis information to one's adversary, means that parties no longer will simply be responsible for responding to discovery requests, which are often validly subject to dispute for being overbroad or vague. Instead, the rules themselves would create for parties and their counsel a broad and vague requirement to evaluate constantly what information might be considered "relevant" to the facts pleaded and to disclose immediately all such information. Parties would be required to conduct a "reasonable" investigation and disclose what they learn to avoid violating the rule.³⁰ Compliance with these requirements would be judged through twenty-twenty hindsight.

²⁹ Statement of Justice Scalia at 4 (emphasis in original).

³⁰ See Proposed Rule 26(g)(1) and Advisory Committee's Note, reprinted in Amendments to the Federal Rules of Civil Procedure and Forms, H.R. Doc. No. 74, 103rd Cong., 1st Sess. at 229 (1993).

This reformulation of the pretrial adversary process is so radical that it threatens the most fundamental elements of our adversary system. It requires litigants to use their time, money and personnel resources in effect to aid the opposing side in litigation. Moreover, as Justice Scalia put it, "[r]equiring a lawyer to make a judgment as to what information is 'relevant to disputed facts' plainly requires him to use his professional skills in the service of the adversary."³¹

The problems created by this radical transformation of the parties' and counsel's duties is explored further in the statement submitted at this hearing on behalf of Lawyers for Civil Justice and others. We join wholeheartedly in that discussion of the serious risks and dilemmas that Rule 26(a)(1) would create.

III. CONGRESS SHOULD SCRUTINIZE THE PROPOSED RULE CHANGES WITH UNUSUAL CARE IN LIGHT OF THE SUPREME COURT'S TEPID "APPROVAL," SERIOUS PROCEDURAL CONCERNS, AND THE BREADTH OF OPPOSITION TO MANDATORY DISCLOSURE.

The statement submitted on behalf of the Lawyers for Civil Justice and others also explains with great authority why Congress can and should act here under the

³¹ Statement of Justice Scalia at 5.

Rules Enabling Act. We concur and join with that explanation. We want to emphasize in particular three important and unusual circumstances that are present here and which counsel in favor of careful Congressional scrutiny.

First, the Supreme Court's review was extraordinary, to say the least. Three Justices -- Scalia, Thomas and Souter -- dissented vigorously on the mandatory disclosure provision.³² Justice White filed a separate statement in which he explained the extremely limited role that he believed the Court takes in reviewing proposed Rule changes, which he described as restricted to evaluating whether "the rulemaking process has failed to function properly."³³ And, perhaps most strikingly, picking up on that theme, in his letter to Congress transmitting the proposed changes on behalf of the Court, Chief Justice Rehnquist wrote, "While the Court is satisfied that the required procedures have been observed, this transmittal does not necessarily

³² Justice Scalia, joined by Justice Thomas, also objected strenuously to the proposed weakening in Rule 11.

³³ Statement of Justice White, accompanying Order and Memorandum Transmitting Amendments to the Federal Rules of Civil Procedure to the Congress, April 22, 1993, at 5.

indicate that the Court itself would have proposed these amendments in the form submitted."³⁴

Second, the mandatory disclosure requirement was subject to so much criticism during the notice-and-comment stage of promulgating the proposed amendments that the Judicial Conference dropped it from the proposed amendments, and then suddenly restored it at the last minute in a revised form. That revised version of the mandatory disclosure requirement was never subject to public comment or discussion, but was simply sent on to the Supreme Court.

Third, the mandatory disclosure requirement has been criticized by professional groups on both sides, plaintiff and defense, and by litigants like us. For example, and aside from the overwhelming opposition expressed during the Judicial Conference proceedings, the Chamber of Commerce and the Association of Defense Trial Attorneys joined with, among others, the Public Citizen Litigation Group in a submission to the Supreme Court in opposition to the mandatory disclosure requirement. Indeed, we are unaware of many, if any, supporters of the proposal outside of the Judicial Conference.

³⁴ April 22, 1993 Letter from Chief Justice William H. Rehnquist to Speaker of the House of Representatives Thomas S. Foley, transmitting proposed amendments to the Federal Rules of Civil Procedure.

IV. THE WEAKENING OF RULE 11 EXACERBATES THE PROBLEMS THAT RULE 26(a)(1) WOULD CREATE AND IS OTHERWISE UNWISE.

The risks that Rule 26(a)(1) creates of additional, unnecessary and unfair costs and burdens is only increased by the proposed alteration in Rule 11, which today provides at least some deterrence of frivolous filings. By weakening its application generally and eliminating entirely its application to discovery disputes, litigants in effect are given additional leeway to press baseless claims, including claims concerning the mandatory disclosure obligations, with fewer attendant risks. Yet, it is far from clear that the case has been made for accepting this additional cost to litigants like ourselves, who are often the target of frivolous "strike suits," designed to extort nuisance value settlements.

In this regard, we note the concerns expressed in the more comprehensive discussion of the problems with the proposed amendments to Rule 11 contained in the statement submitted for this hearing on behalf of the American Insurance Association, and we ask the Subcommittee to give those concerns serious consideration.

CONCLUSION

Rule 26(a)(1) reaches out in an area of great controversy to impose nationwide a radical change in civil discovery rules, a change that is almost universally viewed as a change for the worst, and it does so at the very moment that the courts are developing a record on civil litigation reform under a program of experimentation that Congress mandated. Under these circumstances, we, as strong advocates of truly effective civil litigation reform, urge this Subcommittee to write and report legislation to strike the provisions of Rule 26(a)(1) from the amendments to the Federal Rules of Civil Procedure that are scheduled to go into effect on December 1, 1993.

EXHIBIT 1

MEMBERS OF THE TASK FORCE

The following were members of the Brookings Task Force on Civil Justice Reform:

DEBRA BALLEW is Vice President for Policy Development and Research at the American Insurance Association in Washington, D.C., where she is responsible for long-range planning on a variety of issues affecting the property-casualty insurance industry.

ROBERT BANKS is Counsel to Latham & Watkins in New York. He was formerly General Counsel of the Xerox Corporation and Chairman of the Board of the American Corporate Counsel Association.

ROBERT G. BEGAM is President of Langerman, Begam, Lewis and Marks, P.A., in Phoenix, Arizona. He has served as President of the Association of Trial Lawyers of America.

GIDEON CASHMAN is a senior partner at Pryor, Cashman, Sherman & Flynn in New York.

ALFRED W. CORTESE is a partner at Kirkland & Ellis, Washington, D.C., who has litigated numerous commercial, antitrust, tort, and products liability cases in the courts and administrative agencies. He is a former Assistant Executive Director of the Federal Trade Commission and is currently a member of the Executive Committee of Lawyers for Civil Justice.

SUSAN GETZENDANNER is a partner at Skadden, Arps, Slate, Meagher & Flom in Chicago, Illinois. She was formerly a judge in the United States District Court for the Northern District of Illinois.

MARK GITENSTEIN (Reporter) is Counsel to Mayer, Brown & Platt in Washington, D.C., and Executive Director of the Founda-

JUSTICE FOR ALL

tion for Change, Washington, D.C. He was formerly Chief Counsel to the Judiciary Committee of the U.S. Senate.

BARRY GOLDSTEIN is Director of the Washington office of the NAACP Legal Defense and Educational Fund.

JAMIE GORELICK is a partner at Miller, Cassidy, Larrocca & Lewin in Washington, D.C. She is currently Secretary to the American Bar Association's Section of Litigation and was Chair of its Committee on Complex Crimes Litigation. She has also taught trial advocacy at the Harvard Law School.

MARCIA D. GREENBERGER is the Managing Attorney of the National Women's Law Center in Washington, D.C. She founded the Women's Rights Project of the Center for Law and Social Policy and has practiced law with Caplin & Drysdale in Washington.

PATRICK HEAD is the Vice President and General Counsel of the FMC Corporation. He previously held the same position for Montgomery Ward.

DEBORAH HENSLER is Director of Research at the Institute for Civil Justice, Rand Corporation, Santa Monica, California.

W. MICHAEL HOUSE is a partner at Shaw, Pittman, Potts & Trowbridge in Washington, D.C. He was formerly Administrative Assistant to Senator Howell Heflin.

SHIRLEY HUFSTEDLER is a partner at Hufstedler, Miller, Kaus & Beardsley in Los Angeles. She formerly served as U.S. Secretary of Education, a federal judge on the United States Court of Appeals for the Ninth Circuit, and a county and state court judge in California.

KENNETH KAY is a partner at Preston, Thorgrimson, Ellis & Holman, Washington, D.C., and Executive Director of the Council on Research and Technology. He was formerly a Counsel to the Judiciary Committee of the U.S. Senate and Legislative Director for Senator Max Baucus.

GENE KIMMELMAN is the Legislative Director of the Consumer Federation of America, where he directs the federation's legislative

and regulatory intervention program. He was formerly a staff attorney for Congress Watch.

NORMAN KRIVOSHA is Executive Vice President-Administration and General Counsel for Ameritas Financial Services of Lincoln, Nebraska. He was formerly the Chief Justice of the Nebraska Supreme Court.

LEO LEVIN is Leon Meltzer Professor of Law Emeritus at the University of Pennsylvania Law School, specializing in civil procedure and judicial administration. He was formerly Director of the Federal Judicial Center.

CARL D. LIGGIO is the General Counsel of Ernst & Young in New York. He was formerly Chairman of the Board of the American Corporate Counsel Association.

ROBERT E. LITAN (Reporter) is a Senior Fellow and Director of the Center for Economic Progress within the Economic Studies Program at the Brookings Institution. He is also Counsel to Powell, Goldstein, Frazer & Murphy in Washington, D.C., and a Visiting Lecturer in Banking Law at the Yale Law School.

FRANK MCFADDEN is the Senior Vice President and General Counsel of Blount, Inc. He was formerly Chief Judge of the United States District Court for the District of Alabama and he is currently Chairman of the Board of the American Corporate Counsel Association.

FRANCIS MCGOVERN is a Professor of Law at the School of Public Health, University of Alabama at Birmingham. He has served as a special master in several major cases involving toxic tort allegations.

STEPHEN B. MIDDLEBROOK is the Senior Vice President and General Counsel at Aetna Life & Casualty. He served on the American Bar Association's Action Commission to Improve the Tort Liability System and was a founder of the American Corporate Counsel Association, where he now serves on the Executive Committee.

EDWARD MULLER is Vice President, General Counsel, and Chief Administrative Officer of Whittaker Corporation. He formerly practiced law with the Washington, D.C., firm of Leva, Hawes, Symington, Martin & Oppenheimer.

ROBERT M. OSGOOD is a partner in charge of litigation, antitrust, arbitration and competition law services in the London office of Sullivan & Cromwell. He was formerly Managing Partner of the firm's Litigation Group in New York.

ALAN PARKER is Deputy Executive Director of the Association of Trial Lawyers of America. He was formerly General Counsel to the House Judiciary Committee.

RICHARD PAUL is Vice President and General Counsel of Xerox Corporation. He was previously in private law practice.

JUDYTH PENDELL is an Assistant Vice President of Law and Public Affairs at Aetna Life & Casualty, where she oversees the company's civil justice reform efforts.

JOHN A. PENDERGRASS is a Senior Attorney in the Research and Policy Analysis Division of the Environmental Law Institute. He formerly taught law at the Illinois Institute of Technology, Chicago-Kent College of Law, and practiced law in the public and private sectors.

GEORGE PRIEST is the John M. Olin Professor of Law and Economics at the Yale Law School, where he teaches torts, products liability, insurance policy, and antitrust law. He also directs the Program in Civil Liability at the Yale Law School.

CHARLES B. RENFREW is a Director and Vice President-Law of the Chevron Corporation. He was formerly a United States District Judge for the Northern District of California and Deputy Attorney General of the United States.

TONY ROISMAN is Of Counsel to Cohen, Milstein & Hausfeld in Washington, D.C. He formerly served as the Director of Trial Lawyers for Public Justice and as Chief of the Hazardous Waste Section of the Land and Natural Resources Division of the U.S. Department of Justice.

JOHN F. SCHMUTZ is the Senior Vice President and General Counsel for E.I. duPont de Nemours & Company, Wilmington, Delaware.

CHRISTOPHER SCHROEDER is a Professor of Law at the Duke University Law School, where he teaches civil procedure, environmental law, and property. Previously he practiced law with McCutchen, Doyle, Brown & Emerson and Armour, Schroeder, St. John and Wilcox, specializing in civil litigation.

BILL WAGNER is a trial lawyer in Tampa, Florida, who represents claimants in personal injury and wrongful death matters. Currently he is the President of the Association of Trial Lawyers of America.

DIANE WOOD is Associate Dean and Professor of Law at the University of Chicago Law School. Formerly she practiced law with Covington & Burling in Washington, D.C.

In addition to the above members, several individuals provided valuable assistance to the task force during its deliberations. They include:

Jeffrey Connaughton, *Special Assistant, Senate Judiciary Committee*

Terrence Dungworth, *Institute for Civil Justice, Rand Corporation*

Frank Flegal, *Professor of Law, Georgetown University Law School*

Mary Kay Kane, *Professor of Law, Hastings College of Law, University of California*

Jeffrey Peck, *General Counsel, Senate Judiciary Committee*

The Honorable Robert F. Peckham, *Chief Judge, Northern District of California*

Leonard M. Ring, *Chairman of the Torts and Insurance Practice Section of the American Bar Association and former President of the Association of Trial Lawyers of America*

Maurice Rosenberg, *Professor of Law, Columbia Law School*

The Honorable Carl Rubin, *Chief Judge, Southern District of Ohio*

Thomas J. Scheuerman, *Associate General Counsel, 3M Corporation*

Molly Selvin, *Institute for Civil Justice, Rand Corporation*

District Court Civil Justice Expense
and Delay Reduction Plans:
Mandatory Document and Witness Disclosure¹

<u>District</u>	<u>Mandated Disclosure</u>
D. Alaska	According to the Judicial Conference Report, the court is experimenting with some form of mandatory disclosure.
E.D. Arkansas	None
E.D. California	None
N.D. California	Parties must disclose documents in their custody or control that are reasonably available and tend to support positions the disclosing party has taken or is reasonably likely to take. The parties must also disclose information regarding persons known to have discoverable information about factual matters relevant to the case. The plan exempts 41 categories of cases from the disclosure requirements including class actions and multidistrict litigation.
S.D. California	None

¹ Compiled from information provided in Section of Litigation, American Bar Association, Report of the Task Force on the Civil Justice Reform Act app. B-1 (July 1992) ("ABA Report") and Judicial Conference of the United States, Civil Justice Reform Act Report: Development and Implementation of Plans By Early Implementation Districts and Pilot Courts 12 & exhibit D (June 1, 1992) ("Judicial Conference Report"). Information on the Northern District of California was obtained from General Order No. 34, Case Management Pilot Program (N.D. Cal. 1992).

DistrictMandated Disclosure

- D. Delaware Parties must disclose documents in their control, but only in personal injury, medical malpractice, employment discrimination and civil RICO cases. They must also disclose information regarding persons interviewed in connection with the litigation.
- S.D. Florida No additional requirements. According to the Judicial Conference Report, a local rule requires parties to exchange documents and witness lists.
- N.D. Georgia Each party must answer mandatory interrogatories developed by the court.
- D. Idaho Parties must disclose potential trial exhibits and information regarding persons with knowledge that significantly bears on any claim/defense.
- S.D. Illinois Parties must disclose documents/tangible items in their control which are likely to bear significantly on any claim/defense. They must also disclose information regarding persons likely to have information that bears significantly on any claim/defense, identifying subjects of information.
- N.D. Indiana According to the ABA Report, in one judge's court, parties must disclose documents/tangible items that bear significantly

<u>District</u>	<u>Mandated Disclosure</u>
	on any claim, defense or entitlement to relief. According to the Judicial Conference Report, the district is experimenting with three different plans requiring varying degrees of disclosure.
S.D. Indiana	None
D. Kansas	None
D. Massachusetts	Parties must disclose documents reasonably likely to bear substantially on any claim/defense.
W.D. Michigan	None
D. Montana	Parties must disclose documents/tangible evidence reasonably likely to bear on any claim/defense.
D. New Jersey	None
E.D. New York	Parties must disclose documents in their control bearing significantly on any claim/defense, documents relied on by parties in preparing pleadings, and documents expected to be used to support allegations.
S.D. New York	According to the ABA Report, only documents must be disclosed and only in expedited cases. According to the Judicial Conference Report, standardized discovery procedures will apply in prisoner <u>pro se</u> cases.
N.D. Ohio	None

DistrictMandated Disclosure

W.D. Oklahoma

Parties must disclose documents/tangible items in their control which are likely to bear significantly on any claim/defense.

D. Oregon

None

E.D. Pennsylvania

Parties must disclose documents/tangible things in their control which are likely to bear significantly on any claim/defense. They must also disclose information regarding persons reasonably likely to have information that bears significantly on any claim/defense, identifying subjects of information.

W.D. Tennessee

N/A

E.D. Texas

Parties must disclose documents/tangible items in their control which are likely to bear significantly on any claim/defense. They must also disclose information regarding persons likely to have information that bears significantly on any claim/defense, identify subjects of information, and provide summary of substance of information known by person. According to the Judicial Conference Report, the disclosure requirements apply only to cases in three of the court's six processing "tracks."

S.D. Texas

According to the Judicial Conference Report, the court is experimenting with mandatory disclosure in a limited number of cases.

DistrictMandated Disclosure

D. Utah	None
D. Virgin Islands	Parties must disclose documents/tangible items in their control which are likely to bear significantly on any claim/defense. They must also disclose information regarding persons likely to have information that bears significantly on any claim/defense, identifying subjects of information.
E.D. Virginia	None
N.D. West Virginia	Parties must disclose documents/tangible items in their control which are likely to bear significantly on any claim/defense. They must also disclose information regarding persons reasonably likely to have information that bears significantly on any claim/defense, identifying subjects of information.
S.D. West Virginia	None
E.D. Wisconsin	According to the Judicial Conference Report, the parties must answer mandatory interrogatories.
W.D. Wisconsin	According to the Judicial Conference Report, there are no disclosure requirements for documents or fact witnesses, but parties must disclose information regarding expert witnesses.
D. Wyoming	Parties must disclose documents/tangible items in their control likely to bear

DistrictMandated Disclosure

significantly on any claim/defense. They must also provide a list of fact witnesses with a summary of expected testimony.

CJRA Plans of District
Courts in States of Subcommittee Members:
Mandatory Document and Witness Disclosure¹

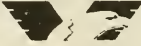
<u>State</u>	<u>District</u>	<u>Mandated Disclosure</u>
CA	E.D. California	None
	N.D. California	Parties must disclose documents in their custody or control that are reasonably available and tend to support positions the disclosing party has taken or is reasonably likely to take. The parties must also disclose information regarding persons known to have discoverable information about factual matters relevant to the case. The plan exempts 41 categories of cases from the disclosure requirements including class actions and multidistrict litigation.
	S.D. California	None
FL	S.D. Florida	No additional requirements. According to the Judicial Conference Report, a local rule requires parties to exchange documents and witness lists.

¹ Compiled from information provided in Section of Litigation, American Bar Association, Report of the Task Force on the Civil Justice Reform Act app. B-1 (July 1992) ("ABA Report") and Judicial Conference of the United States, Civil Justice Reform Act Report: Development and Implementation of Plans By Early Implementation Districts and Pilot Courts 12 & exhibit D (June 1, 1992) ("Judicial Conference Report"). Information on the Northern District of California was obtained from General Order No. 34, Case Management Pilot Program (N.D. Cal. 1992).

DistrictMandated Disclosure

MA	D. Massachusetts	Parties must disclose documents reasonably likely to bear substantially on any claim/defense.
MI	W.D. Michigan	None
NJ	D. New Jersey	None
NY	E.D. New York	Parties must disclose documents in their control bearing significantly on any claim/defense, documents relied on by parties in preparing pleadings, and documents expected to be used to support allegations.
	S.D. New York	According to the ABA Report, only documents must be disclosed and only in expedited cases. According to the Judicial Conference Report, standardized discovery procedures will apply in prisoner <u>pro se</u> cases.
OK	W.D. Oklahoma	Parties must disclose documents/tangible items in their control which are likely to bear significantly on any claim/defense.
WI	E.D. Wisconsin	According to the Judicial Conference Report, the parties must answer mandatory interrogatories.
	W.D. Wisconsin	According to the Judicial Conference Report, there are no disclosure requirements for documents or fact witnesses, but parties must disclose information regarding expert witnesses.

APPENDIX 6.—STATEMENT OF HERBERT E. HOFFMAN, ON BEHALF OF
THE NATIONAL ASSOCIATION OF PROFESSIONAL PROCESS SERVERS
(NAPPS), JUNE 10, 1993



NATIONAL ASSOCIATION OF PROFESSIONAL PROCESS SERVERS



TESTIMONY OF THE NATIONAL ASSOCIATION OF PROFESSIONAL PROCESS
SERVERS FOR THE HOUSE JUDICIARY SUBCOMMITTEE ON INTELLECTUAL
PROPERTY AND JUDICIAL ADMINISTRATION ON PROPOSED AMENDMENTS
TO THE FEDERAL RULES OF CIVIL PROCEDURE

Mr. Chairman and Members of the Subcommittee:

I am Herbert E. Hoffman and submit this statement on behalf
of the National Association of Professional Process Servers
(NAPPS).

First, a word about NAPPS. This organization has been serving
the Bar and the courts for about 11 years. Its approximately
900 members have offices throughout the United States and in
Australia, Belgium, Canada, England, Italy, New Zealand, Puerto
Rico, and the U. S., Virgin Islands.. Not only do the members
and their staffs serve process, but they perform a myriad of
other functions for attorneys - court filings, document searches,
etc.

NAPPS has a strict set of By-Laws and a Code of Ethics the
violation of which may subject a member to expulsion. Over
the years NAPPS representatives have worked closely with the
Judicial Conference Advisory Committee on Civil Rules and has
often been complimented by various of the committee's
chairpersons and the immediate past Reporter, Dean Carrington,
for its helpfulness concerning practical problems incident to
the service of process.

In 1982 Congress considered and disapproved an amendment to Rule 4 proposed by the Supreme Court. It then proceeded to enact Public Law 97-462 (96 Stat 2527) which provided for the so-called "notice and acknowledgment" procedure now in use (Rule 4 (c)(C)(2)(ii)). In essence, this procedure provides for a plaintiff to send to a potential defendant a copy of the summons and complaint by first class mail. Along with the summons and complaint there is sent a notice advising the defendant of what it is he is receiving, requesting he return an acknowledgment of its receipt, and advising him of the consequences of not sending back an acknowledgment.

This procedure has been in effect for 11 years with no major problems having arisen, although one attorney wrote to the Administrative Office of the United States Courts several years ago raising a question as to when service is to be considered complete. The attorneys who practice in the Federal courts and the trial judges are all familiar with this procedure, one which has been in effect satisfactorily in California and some other state courts even longer.

The change proposed by the Supreme Court would scrap the notice and acknowledgment procedure which has worked so well and with which all are familiar and substitute in its place a waiver procedure. As proposed, a plaintiff would send a complaint (no summons) to a potential defendant and request that the defendant waive service of a summons. This notice must be sent

by first-class mail "or other reliable means".The quoted words are extremely ambiguous. Just what is an "other reliable means"? Why make attorneys guess what will satisfy a judge? And what will satisfy one judge may not satisfy another.

In any event, mindful of the old adage - "If it ain't broke, don't fix it", we would suggest that the system in place - notice and acknowledgment- with which lawyers and judges are familiar and which has served the courts well, should be retained.

However, recognizing that the changes proposed to the disclosure and discovery rules are even more controversial, admittedly so in the notes which accompanied their submission , it would seem desirable for the Congress to defer the effective date of the proposed changes to late in the next session. The matters in issue pale into insignificance when compared with the tax, health, deficit, budget, and other major problems to which the Congress must give its immediate attention.

In this witness' memory, which goes back to 1948 insofar as matters such as the instant ones are concerned, this is the first time that three Associate Justices have dissented on matters of substance to the submission of rule changes. Further, with a nomination to the Supreme Court expected momentarily and likely to consume a major part of the time of the Judiciary Committee in the other body, it is most unlikely that the Congress can make an informed, considered judgment on the

desirability of the proposed changes in this session of the Congress. To permit the changes to become effective by default on December 1 would be irresponsible.

Therefore, we respectfully suggest that legislation such as that which is attached to this statement be introduced and enacted prior to December 1, 1993. This will assure the Congress the opportunity to carefully consider the proposed changes and exercise a considered judgment as to their impact on the work of the courts and the interests of party litigants.

We appreciate the opportunity you have afforded us to express our views and ask that all members of the Subcommittee be furnished them and that they be included in the printed record of the hearings.

June 10, 1993

A BILL TO DELAY THE EFFECTIVE DATE OF PROPOSED
AMENDMENTS TO THE FEDERAL RULES OF CIVIL
PROCEDURE

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That notwithstanding the provisions of section 2074 of title 28, United States Code, the amendments to the Federal Rules of Civil Procedure as proposed by the Supreme Court of the United States and transmitted to the Congress by the Chief Justice on April 22, 1993, shall take effect on October 1, 1994, unless previously approved, disapproved, or modified by Act of Congress.

APPENDIX 7.—STATEMENT OF THOMAS HANNA, PRESIDENT,
AMERICAN AUTOMOBILE MANUFACTURERS ASSOCIATION

The American Automobile Manufacturers Association (AAMA) is the trade association for United States car and light truck manufacturers. Our members, Chrysler Corporation, Ford Motor Company, and General Motors Corporation, produce approximately 81% of all U.S.-built motor vehicles. We appreciate the opportunity to explain our opposition to the proposed changes to Federal Rule of Civil Procedure 26(a)(1), which would impose mandatory initial disclosure among parties at an early stage of litigation in federal court.

AAMA members are frequent litigants in federal courts. Most often, they are sued by individuals (sometimes purporting to represent a class) who have been injured while driving or riding in one of the vehicles manufactured by our members. These products liability cases are often complex, involving numerous theories on which liability is alleged. Discovery in these cases often requires an enormous undertaking by our members, because of the large scale and geographic extent of their operations, because of the technical nature of the systems involved, and because of the breadth and ambiguity of the issues.

Purpose and Substance of the Proposed Changes

The stated purposes of the proposed changes to Rule 26(a)(1) are to simplify and reduce the costs of litigation. Amended Rule 26(a)(1) would require manufacturer defendants to disclose infor-

mation that is "relevant to disputed facts alleged with particularity in the pleadings." Virtually any type of information that meets this standard must be disclosed, including: the name, address and telephone number of each individual likely to have discoverable information; and a copy or description of all documents, data compilations, and tangible things in the party's control, custody or possession. Disclosure must be made within 10 days after the parties meet at a discovery conference as required by amended Rule 26(f). The timing of the Rule 26(f) conference is subject to a number of variables. The Committee Notes accompanying the proposed changes indicate that the conference may be a forum for fleshing out the plaintiff's theories stated only broadly in the complaint. In those cases, the Committee Notes indicate that the parties "can and should stipulate to a period of more than 10 days after the meeting in which to make these disclosures * * * ." However, the proposed changes do not require such a stipulation. The recognition in the Committee Notes that such a stipulation may often be necessary betrays the timing problem inherent in the proposed changes: 10 days is simply not enough time to identify potentially relevant information, and many cases will be based on such broad allegations that the manufacturer defendant would not be able to identify the disputed facts prior to the Rule 26(f) conference.

As litigants with extensive experience in complex litigation, much of which accounts for a significant number of cases on crowded urban federal dockets, we are concerned that the proposed chan-

ges to Rule 26(a)(1) will fail to achieve their stated purpose both because they are impracticable (especially in complex litigation such as products liability cases) and because they will continually engender additional satellite litigation over whether the requirements have been met. Overall, the changes will not accomplish the intended purposes of simplifying and reducing the costs of litigation because they try to impose a uniform (and inherently flawed) solution to widely disparate kinds of cases.

**The Proposed Changes will be
Unworkable in Complex Litigation**

The proposed changes to Rule 26(a)(1) will be ineffective in the vast majority of cases. In some suits, the litigants conduct no formal discovery at all. For these cases, the mandatory disclosure rule is unnecessary and imposes an additional litigation cost in that class of cases that is now the least expensive for both parties and the courts to resolve. Because the cost of disclosure in these cases is borne by the party producing the material, there is no incentive for the plaintiff to forgo receiving the information.

In many other cases, the requirement of mandatory disclosure is unworkable because of the enormous quantity of potentially relevant information that may be spread across the country in various different locations of a manufacturer's operations, and the difficulty of ascertaining, at the earliest stage of litigation, what information is actually relevant. This is a particular problem in complex cases (such as products liability suits) which our members

must defend most often, and in which discovery disputes most often arise.

Although the advisory committee made some modifications to the initial proposal in an effort to clarify the standard for required disclosure, the language of the proposed rule -- requiring disclosure of "information relevant to disputed facts alleged with particularity in the pleadings" -- remains ambiguous.

In many products liability cases, the complaint alleges the existence of a defect that caused an injury. While the complaint may allege a wide variety of legal and factual theories on which liability may rest, the plaintiff's attorney will ultimately request discovery only on a few of these theories, not all of them. Often, when the complaint is filed, the plaintiff's attorney has not yet decided which of the various theories he or she will actually pursue vigorously. The complaint itself -- even limited to those facts that may be said to have been "alleged with particularity" -- does not offer enough information for a manufacturer defendant to ascertain what will really be at issue in the case. If the manufacturer undertakes the enormous effort that would be required to locate all potentially relevant information (including all documents) for every theory, much of that effort would be wasted.

Even when a complaint alleges only one defect, the information relevant to that claim may be found by a court to be extremely broad. For example, in a recent case involving one of our members, the plaintiff claimed a defect in the rear outboard seatbelt

system. The court found that information about all seatbelts -- front as well as rear -- in all the company's cars was relevant to the complaint. If the proposed changes to Rule 26(a)(1) go into effect, would this earlier ruling define "relevant" information in all seatbelt cases? Conversely, if an auto manufacturer relied on this ruling and identified massive amounts of information about all seatbelt systems when only one was challenged, would the manufacturer be sanctioned for inundating the plaintiff with irrelevant material about seatbelt systems other than the one at issue? When a system design is challenged, are similar designs relevant? Are dissimilar designs more relevant?

Further, the effort required by the rule change literally would be impossible to complete within the time allowed by the proposed rule. Products liability cases often are based on allegations concerning a variety of different systems, subsystems and components in a motor vehicle. These systems, subsystems and components are typically designed and manufactured by a large number of divisions within the company and its vendors. In order to identify individuals and documents that could be relevant to a plaintiff's theory, a manufacturer must first identify each system, subsystem and components that could possibly be at issue in the case. The manufacturer must then identify each division and vendor involved in the design, manufacture and assembly of that system, subsystem and associated components. The end result of this process is often an enormous quantity of paper that must be reviewed for potential relevance, as well as for claims of attor-

ney-client and work-product privileges. Further, literally tens, if not hundreds of individuals must be interviewed in order to determine whether they are likely to have discoverable information. Given the size and scope of our members' operations, and the hundreds of products liability suits filed against them each year, such an undertaking cannot be completed within the time contemplated by the proposal. For example, for systems which have been the subject of repeated litigation, certain of our members have established "reading rooms" where all relevant documents are made available for plaintiffs' attorneys to review. One such reading room related to passive restraints took more than five years to assemble, must be continually updated, and presently contains over 1.5 million pages of documents.

**The Initial Disclosure Proposal Would
Engender Additional Satellite Litigation**

A second problem is that the proposed mandatory disclosure provisions will generate additional satellite litigation about whether the requirements have been fulfilled. Although the intention of the advisory committee and the Judicial Conference was to streamline the discovery process and reduce the cost of litigation in federal courts, the proposed changes to Rule 26(a)(1) will actually increase the costs of litigation substantially and increasingly involve the court's time.

Today, unfortunately, many discovery disputes have less to do with obtaining relevant information than with an attempt to gain a tactical advantage over the opposing party. For example, in a recent case where one of our members was the defendant, the plain-

tiff succeeded in obtaining a broad order compelling discovery, the defendant produced thousands of documents, and the plaintiff reviewed only a small number of them.

Because of the possibility of tactical advantage (including the potential for plaintiffs to impose significant costs on manufacturer defendants in products liability suits, and especially in the light of the risk that severe sanctions, including default, could be imposed), a great deal of litigation resources would be focused on disputes over whether the disclosure requirements have been fulfilled rather than adjudicating the merits of the suit. These disputes would not serve the purpose of simplifying or streamlining the discovery process; instead, they would add an additional and significant level of pretrial expense to litigants and would require judges to referee needless arguments. This committee has as its goal the elimination of potential avenues for such abuse. But the proposal to impose disclosure requirements would give lawyers additional work at the cost of their clients' (and the public's) interest in efficient, streamlined judicial decisionmaking.

These disputes will not be limited to the initial implementation period during which the disclosure requirement is clarified by court decisions. The disclosure requirement's contours would be different in each case because the standard is based on the factual allegations of the pleadings. As a consequence, disputes over disclosure are likely to arise in every case, and must be relitigated under the factual allegations in each proceeding.

The new rule would provide too many chances for lawyers to fight about trivial procedural questions in the pursuit of often fruitless efforts to secure a strategic advantage (which in many cases amounts to no more than an attempt to impose additional litigation costs on the other side). For example, lawyers will undoubtedly challenge the sufficiency of their opponents' disclosure and whether the opponents have fulfilled their continuing duty to disclose additional information as it becomes known. At the same time, attorneys may be forced to seek protective orders in order to safeguard privileged or confidential information. In other words, the lawyers will have repeated opportunities from both sides to dispute the requirements under revised Rule 26(a)(1).

The Committee Should Delete the
Initial Disclosure Proposal

Finally, we would point out that the arguments raised against this rule have come from litigants and lawyers on both sides of the courtroom. Both plaintiffs and defendants have argued that this rule will not accomplish its stated purposes and that it undermines the experimentation provided for by the Civil Justice Reform Act. This is not an issue on which one side seeks to exact an advantage over the other. Rather, this subcommittee has heard from a wide variety of sources that raise deep-seated and thoughtful concerns about the effect of the proposed changes. In the light of those widespread and sustained concerns, Congress should exercise its authority to prevent the proposed changes to Rule 26(a)(1) from taking effect.

While some have suggested that Congress should simply delay the implementation of the Rule 26(a)(1) changes, we contend that such an approach would be inconsistent with the procedure established in the Rules Enabling Act. That procedure ensures that initial consideration of changes to federal rules will be undertaken by the Judicial Conference through its advisory committees, with appropriate public input by notice and comment. The procedure then mandates that the rule changes should be forwarded by the Supreme Court to the Congress. At any stage, the changes may be altered or eliminated.

This procedure is important to the integrity of the means by which Congress has seen fit to delegate rulemaking power to an independent arm of the judiciary while retaining ultimate authority to oversee the exercise of that power. It is a much more invasive remedy for Congress itself to make changes to a set of proposed rule changes. We believe it is more appropriate for Congress to exercise its authority simply by striking the disclosure provision from the changes.

This would permit the remainder of the changes to take effect, and it would give the Judicial Conference an opportunity to take into account the concerns expressed by Congress and members of the public (as well as four members of the Supreme Court). It is appropriate for the Conference to have an opportunity to reconsider its proposal in the light of those concerns. As the body charged with initial consideration of rule changes, it should have the opportunity to use its expertise to correct the problems perceived by Congress and others. The best course of action is for this subcommittee to recommend that the disclosure requirements be stricken from the package of proposed rule changes.

9-17-77

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APPENDIX 8.—LETTER FROM ERWIN N. GRISWOLD, ESQ., JONES, DAY, REAVIS & POGUE (WITH ATTACHMENTS), TO HON. WILLIAM J. HUGHES, CHAIRMAN, SUBCOMMITTEE ON INTELLECTUAL PROPERTY AND JUDICIAL ADMINISTRATION, JUNE 15, 1993

JONES, DAY, REAVIS & POGUE

ATLANTA
AUSTIN
BRUSSELS
CHICAGO
CLEVELAND
COLUMBUS
DALLAS
FRANKFURT
GENEVA
HONG KONG

IRVINE
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June 15, 1993

Hon. William J. Hughes
United States House of Representatives
241 Cannon House Office Building
Washington, D.C. 20515

Dear Mr. Chairman,

I understand that your subcommittee of the House Judiciary Committee will conduct a hearing on June 16, 1993 concerning amendments to the Federal Rules of Civil Procedure forwarded to Congress by the Supreme Court on April 22, 1993. Earlier I had occasion to submit a memorandum to the Court on behalf of a number of interested organizations, opposing adoption of the proposed mandatory, pre-discovery disclosure amendment found in Rule 16(a)(1). I submitted this memorandum because I believe that disclosure is a flawed concept; the standard for disclosure is unacceptably vague; the proposal would encourage unnecessary satellite litigation; and disclosure is inconsistent with the ethical obligations of lawyers to their clients under the adversary system, adversely affecting the attorney-client relationship and the work-product doctrine.

I continue to oppose mandatory, pre-discovery disclosure and hope that Congress will take action to delete Rule 16(a)(1) from the pending amendments.

In the event you might wish to make my this memorandum a part of the Committee record, I am enclosing twenty-five copies for the members and staff of your subcommittee.

Please let me know if I may be of further assistance.

Respectfully submitted,

Erwin N. Griswold
Erwin N. Griswold

**MEMORANDUM TO THE CHIEF JUSTICE OF THE UNITED STATES
AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT:**

**COMMENTS ON PROPOSED "DISCLOSURE" AMENDMENT TO
FEDERAL RULE OF CIVIL PROCEDURE 26(A)(1)**

SUBMITTED BY

**AMERICAN LEGISLATIVE EXCHANGE COUNCIL
ASSOCIATION OF DEFENSE TRIAL ATTORNEYS
BUSINESS ROUNDTABLE LAWYERS COMMITTEE
CHAMBER OF COMMERCE OF THE UNITED STATES
FEDERATION OF INSURANCE AND CORPORATE COUNSEL
INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL
LAWYERS FOR CIVIL JUSTICE
LITIGATION SECTION OF THE DISTRICT OF COLUMBIA BAR*
PUBLIC CITIZEN LITIGATION GROUP**

February 10, 1993

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MEMORANDUM TO THE CHIEF JUSTICE OF THE UNITED STATES
AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT:

COMMENTS ON PROPOSED "DISCLOSURE" AMENDMENT TO
FEDERAL RULE OF CIVIL PROCEDURE 26(a)(1)

Submitted By

I. Summary

The undersigned organizations respectfully request that the Court reject the proposed amendment to Federal Rule of Civil Procedure 26(a)(1) that would impose "on parties a duty to disclose, without awaiting formal discovery requests, certain basic information"¹ The proposed automatic, pre-discovery disclosure amendment, described by even its drafters as "radical," is the most widely controversial of the amendments to the federal civil rules and forms that the Judicial Conference forwarded to the Court for approval on November 27, 1992.² The disclosure proposal should be returned to the Committee on Rules because of defects in the process through which the proposal was adopted, and substantive flaws in the proposal itself. Although the organizations joining this memorandum oppose the proposed disclosure amendment to Rule 26(a)(1), we commend the Committee for its excellent work in making significant other improvements in the Rules.

¹ Committee Notes on Rule 26(a)(1), Standing Comm. on Rules of Practice and Procedure, Judicial Conference of the United States, Proposed Amendments To The Federal Rules of Civil Procedure and Forms, 93-94 (November 1992) [hereinafter "November 1992 Amendments"]. Attached as Appendix A.

² See Administrative Office of the U.S. Courts, November 27, 1992 Memorandum to the Chief Justice of the United States and the Associate Justices of the Supreme Court [hereinafter "Transmittal Memorandum to Supreme Court"].

Contrary to the spirit of the 1988 congressional mandate directing increased public involvement in the rules amendment process, no public comment was solicited from the bench or bar on the final version of the Rule 26(a)(1) amendment. Public comment was solicited on an earlier version of the disclosure amendment put forth in August of 1991. Over two hundred written statements of opposition from every segment of the bench, bar, and business community were filed with the Advisory Committee in response.³ At two public hearings on the August 1991 version of the amendments, one in November of 1991 in Los Angeles and the second in February of 1992 in Atlanta, 76 witnesses testified against disclosure because of the harmful effects the concept will have on litigants, discovery, and the civil justice system generally.

The widespread opposition was based on firmly expressed views that the disclosure proposal would create serious new problems with the pretrial process and exacerbate the very discovery abuses that the Advisory Committee intended to cure. The Advisory Committee initially seemed responsive to these concerns. In fact, it voted to withdraw the disclosure concept from the remaining proposed amendments at the close of the last public hearing in February 1992. Shortly before the Committee's next meeting, however, but after the period for public comment had closed, a memorandum was circulated calling for the Advisory Committee to reinstate the disclosure proposal.⁴ In response, a

³ Over 95% of the 208 judges, bar organizations, scholars, corporations, and individual members of the bar who commented on the initial public version of the proposed disclosure amendment were against it. See Appendix B, Summary of Comments In Opposition To Disclosure; Appendix C, Individuals and Organizations Submitting Comments In Opposition To Disclosure.

⁴ See Ann Pelham, Panel Flips, OKs Discovery Reform, Legal Times, Apr. 20, 1992, at 6 (copy of article attached at Appendix D).

substantially revised version of the disclosure proposal was drafted overnight during the April 1992 meeting, approved, and forwarded to the Rules Committee without being circulated to the public or published in even a single legal periodical. As a consequence, the bench, bar, and public were prevented from having any meaningful opportunity to comment on the revisions or to consider whether the amendments were responsive to the significant concerns initially expressed.

The decision not to allow public comment on the revised disclosure amendment assumes even greater importance in light of the amendment's potential to undermine other discovery reform activities now underway in a significant number of federal district courts.⁵ Under a mandate from Congress enacted in the Civil Justice Reform Act of 1990, federal district courts must identify the most effective means for eliminating abuse, expense, and delay in litigation generally and discovery in particular, and implement experimental reform plans to correct the abuse, expense, and delay.⁶ Most of the plans already effected by district courts have implemented an experimental disclosure plan different from the proposed amendment to Rule 26(a)(1) and some have not proposed disclosure at all.

Preliminary information from these experiments would have been available in a short time if the Committee had stayed its hand as many commenters requested. With empirical data from the experimental districts, the Committee could have fine-tuned its

⁵ Cf. Ann Pelham, Irate Litigators Abort Federal Discovery Reforms, American Lawyers News Service, Mar. 23, 1992, reprinted in The Connecticut Law Tribune, pg. 14 (Committee chairman Judge Sam Pointer acknowledges value of waiting for results from reform experiments before changing discovery rule).

⁶ See Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (1990).

proposal, embracing the most workable disclosure ideas to emerge from the experiments for implementation nationwide as part of the Committee's revisions to Rule 26(a)(1) or abandoning the concept altogether if it was found unworkable. Instead, the Committee chose to go forward without guidance from the experimental plans, just as it decided not to accept further comments from the bench and bar. As a result, the proposed amendment to Rule 26(a)(1) lacks empirical support and is opposed by most of those practitioners who have to deal with it on a day-to-day basis.

The disclosure proposal is just as flawed in concept as it is in execution. Proposed automatic disclosure merely adds another layer to discovery: an untested and certainly unproven preliminary procedure that will not eliminate discovery abuses. The vague and unwieldy disclosure standard itself will precipitate additional litigation abuse, expense, and delay. Moreover, disclosure is incompatible with the adversary system. It places counsel's new obligations to the opponent and the court in conflict with counsel's traditional ethical obligation to the client, and it undermines the attorney work product doctrine.

Because of the flaws in both its execution and its substance, the proposed amendment to Rule 26(a)(1) should be returned to the Committee on Rules for additional public comment and debate. Whether disclosure is the most viable discovery reform, and if so, what form it should take, should be debated publicly in light of real world experience with the CJRA plans. Public comment can help identify pitfalls inherent in the current draft and solutions to the most objectionable aspects of the amendment. Full consideration of the public comments should facilitate greater acceptance of the disclosure concept by members of the bench and bar. Ultimately, additional comment and review of all the reform options

will provide a more realistic basis for final decisions about the future of the pending disclosure amendment and the most appropriate means of eliminating discovery abuse.

II. Approving The Proposed Disclosure Amendment to Rule 26(a)(1) In The Face Of Overwhelming Opposition, Without Additional Public Comment, Compromises The Rules Amendment Process.

As Congress deliberated over the 1988 amendments to the Rules Enabling Act, it debated whether to eliminate this Court's role in the process of reviewing and approving proposed amendments to the rules of procedure in light of the Court's history of serving as "a mere conduit" to Congress.⁷ The Court specifically requested Congress to keep it in the review process and Congress did so.⁸ Although the Court's authority over the rules amendment process has been exercised sparingly, the instances where it has been used to return proposed rules for further comment and revision are strikingly similar to the situation here -- there was a wealth of public opposition to the initial version of the rule and a significant failure by the Rules Committee to respond fully to that opposition. Consequently,

⁷ See H.R. Rep. No. 422, 99th Cong., 1st Sess. 20 (1985); see also Order of Nov. 20, 1972, 34 L. Ed. 2d lxv, lxvi (1972) (approving and transmitting rules of evidence amendments to Congress) (Douglas, J., dissenting) ("[T]his Court does not write the Rules, nor supervise their writing, nor appraise them on their merits, weighing the pros and cons. The Court concededly is a mere conduit.")

⁸ June 25, 1984 Letter from Chief Justice Warren E. Burger to Representative Robert W. Kastenmeier, reprinted in Rules Enabling Act Hearings on Oversight and H.R. 4144 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary, 98th Cong., 1st & 2d Sess., 195 (Apr. 21, 1983 and March 1, 1984).

precedent amply supports a decision to return proposed Rule 26(a)(1) for further public comment and revision at this time.⁹

History also signals that Congress has become involved with the rulemaking process when the process was not responsive to public concerns. Until the massive opposition expressed to the pending disclosure proposal, the civil rules amendment process has only twice before evoked such universal protest from all segments of the bench and bar. In fact, Congress blocked Court approved rules on both of those two occasions: in the early 1970's when the new federal rules of evidence were proposed;¹⁰ and in the early 1980's when a far-reaching change to federal rule 4 was put forth.¹¹ Approval of proposed Rule 26(a)(1) by this Court in the shadow of so much opposition to both the proposed Rule and the process by which it was developed could signal a breakdown in the only function of the judicial branch in which the public is permitted by law to participate.¹² It also raises the

⁹ See Transmittal Memorandum To Supreme Court, *supra* note 2, at "Excerpt from the Report of the Judicial Conference Committee on Rules of Practice and Procedure." September 1992, pg. 1 (discussing return of amendments by Supreme Court to Judicial Conference for additional study in light of objections from British Embassy); Winifred R. Brown, Federal Judicial Center, Federal Rulemaking: Problems and Possibilities 32 n.73 (June 1981) (discussing incidences where Supreme Court returned proposed rules); Rules of Evidence, S. Rep. No. 1277, 93rd Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. and Admin. News 7051, 7052 (acknowledging Supreme Court decision to return proposed rules to rules committee).

¹⁰ See Brown, *supra* note 9; Jack H. Friedenthal, The Rulemaking Power of the Supreme Court: A Contemporary Crisis, 27 Stan. L. Rev. 673, 677 (1975).

¹¹ See 28 U.S.C.A. § 2073 (West Supp. 1992), David D. Siegel, Commentary on 1988 Revision, at 37 (describing controversy in 1980's over revisions to Rule 4 and congressional intervention).

¹² Ann Pelham, Judges Make Quite A Discovery: Litigators Erupt, Kill Plan To Reform Federal Civil Rule, Legal Times, Mar. 16, 1992, at 1.

specter of jeopardizing judicial branch independence in the rulemaking process,¹³ and could diminish respect for and belief in the fairness of the rulemaking process itself.¹⁴ More important, however, it will saddle the civil justice system with a thoroughly unworkable new rule without improving the process of preparing cases for trial.

A. Inadequate Attention To Public Concerns About Proposed Rules Could Compromise Judicial Control Of The Rulemaking Process.

When openness for the civil rulemaking process was mandated in the 1988 amendments to the Rules Enabling Act,¹⁵ Congress clearly contemplated that public comment would be solicited not just on initial drafts of amendments, but also on any significant revisions that were based on the earlier public comments.¹⁶ Public comment and additional deliberation on substantial revisions is the only means of ensuring that the rulemaking process considers the practical experience of, and is responsive to the needs of, judges, lawyers, and litigants. Commentators have suggested that a major factor contributing to the congressional override of the rulemaking process in both the 1970's and the 1980's

¹³ See Ann Pelham, Federal Court Watch: A Legend Worries, Legal Times, June 29, 1992, at 6 (quoting Prof. Charles A. Wright) ("I really worry that if we send this prematurely, we will jeopardize the continued existence of the court rule-making process.") (attached at Appendix E); Siegel, supra note 11, at 37; Friedenthal, supra note 10.

¹⁴ See A Legend Worries, supra note 13.

¹⁵ See Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 403, 102 Stat. 4642 (1988).

¹⁶ See H.R. Rep. No. 422, 99th Cong. 1st Sess., 10; cf. Friedenthal, supra note 10 at 677 (failure to seek public comment on substantially revised evidence rules compromised process and resulted in congressional intervention in rulemaking process).

was "the insertion of major alterations [in the rules] at the last minute so that they appeared for the first time as approved without any opportunity for public comment."¹⁷

Although the federal rulemaking process expressly contemplates some congressional oversight, primary control over the process was vested in the judicial branch in part so that the rules would benefit from the vastly greater experience and insight into the litigation process that judges have over legislators.¹⁸ The judicial branch also was perceived as being less responsive to "interest group politics" than the legislature, providing greater assurance that rules of procedure would be neutral and provide a "level playing field" for all litigants.¹⁹ As such, significant congressional intervention in the rulemaking process is not the norm and, according to the drafters of the rules amendment process, has the potential to compromise both the technical quality of the rules as well as their political neutrality. If a groundswell of public opposition to a proposed rule is likely to trigger congressional intervention, as it has in the past, the rulemaking process and the civil justice system as a whole would be better served if the Court took action to respond to the opposition within the structure of the rulemaking process and the judicial branch. Here, returning the proposed disclosure rule for public comment will protect the integrity of the rulemaking

¹⁷ Siegel, *supra* note 11; Friedenthal, *supra* note 10, at 677. Indeed, in voting against the pending disclosure proposal, Standing Committee member Professor Charles A. Wright noted "[i]f . . . judicial rulemaking . . . is not responsive to [lawyers'] concerns . . . lawyers will seek a veto of the rules from Congress." *A Legend Worries*, *supra* note 13, at 6 (paraphrasing Prof. Charles A. Wright).

¹⁸ See generally J. Weinstein, *Reform of Court Rule-Making Procedures* (1977).

¹⁹ Paul D. Carrington, *Making Rules To Dispose Of Manifestly Unfounded Assertions: An Exorcism Of the Bogy Of Non-Trans-substantive Rules Of Civil Procedure*, 137 U. of Pa. L. Rev. 2067, 2074-75 (1989).

process, increase responsiveness to the needs of the bench and bar, and ensure promulgation of well-crafted rules that preserve the political neutrality of the civil litigation process.

B. The Potential Efficacy Of Reforms Depends Upon Broad Support And Respect For The Reform Proposals.

The strength, depth, and uniformity of opposition to disclosure expressed by virtually all those who commented on it is quite remarkable. Public interest law advocates, plaintiff and defense bar groups, major corporations, small businesses, trade associations, individual practitioners, and federal district court judges opposed it with equal vehemence. If those required to use Rule 26(a)(1) have serious reservations about the rule's utility, the likelihood of its smooth implementation and ultimate value is greatly diminished.

Every procedural reform is dependent to a large extent on the willingness of the bench and bar to make it work. Frustration and annoyance on the part of judges and litigators alike, coupled with widespread doubts that the Rule will eliminate discovery abuse, will make the road to smooth implementation difficult at best. These tensions could be substantially relieved by allowing additional time for members of the bench and bar to tully air their concerns about the revised disclosure proposal, and to allow present understanding of the disclosure process to mature and be tempered by more debate and reflection.

C. Even Preliminary Results From The Civil Justice Reform Act Experiments Could Help Calm Public Concerns And Guide The Decision On Whether Disclosure Can Cure Discovery Abuse.

Failure to await at least preliminary data from the CJRA experiments before moving ahead with the disclosure process contained in Rule 26(a)(1), is inconsistent with the purposes behind those experiments. Recognizing that significant discovery reforms needed to be grounded in empirical data, Congress directed establishment of the experimental

district plans to serve as examples of possible reforms while at the same time yielding empirical data based on actual practice.²⁰ The data from the experimental plans were intended to help guide discovery reforms targeted for nationwide implementation.²¹

Twenty-three of the 34 federal district courts participating in the experiment have opted to implement pre-discovery disclosure procedures, in one of several different forms, as part of their "Expense and Delay Reduction" plans.²² These experimental plans will produce valuable data about whether disclosure is a workable concept at all, and if so, which type of disclosure plan is the most effective and efficient. Delaying implementation of this radical reform to ensure that it has the potential to be effective rather than to cause mischief would be an invaluable safeguard of the integrity of the civil justice process. In fact, Judge Pointer, chairman of the Advisory Committee, recognized the potential value of adopting a wait-and-see attitude when the disclosure amendment initially was tabled, publicly stating that "[i]t makes more sense to get the benefit of that [CJRA] experience before moving ahead."²³

²⁰ See S. Rep. No. 416, 101st Cong., 2d Sess. 2 (1990); 136 Cong. Rec. S17575 (daily ed. Oct. 27, 1990) (Remarks of Sen. Biden).

²¹ See 136 Cong. Rec. S17575, supra note 20.

²² See CJRA Report, supra note 25, at 12. At the time the Advisory Committee first adopted the disclosure concept, it had been briefly in effect in the local rules of only four district courts. See Linda S. Mullenix, Hope Over Experience: Mandatory Informal Discovery And The Politics Of Rulemaking, 69 N. C. L. Rev. 795, 798 n.4 (1991). None of these early local disclosure rules were comparable to the pending disclosure plan because they are self-reflective. That is, they only required disclosure of information related to a party's own claims. These local rules do not require speculation as to what disclosures might be relevant to an opponent's claims. Compare Cal. (C.D.) Local Rules 6.1.1, 6.1.3.-.4. and Fla. (S.D.) Local Rules 14.A.1., 14.A.3.-.4. with Proposed Rule 26(a), November 1992 Amendments, supra note 1, at 72.

²³ Irate Litigators, supra note 5, at 14 (quoting Judge Sam C. Pointer, Jr.).

After initially deciding to defer implementation pending study of the CJRA experimental reform plans,²⁴ the Advisory Committee reversed itself and proposed immediate nationwide adoption of the disclosure amendment.²⁵ Committee members apparently were concerned that any further delay to await early results from the experimental districts would inevitably postpone significant discovery reforms until 1998 at the earliest.²⁶

Reasonable delay to allow consideration and additional input would not require the years of deliberation that went into the initial formulation of the disclosure proposal. In fact, public comment could be obtained and further revisions could be made in little more than one year's time. Only slightly more than one year elapsed from August 1991, when the disclosure rule was initially circulated for public comment, and November 1992, when the final rule was submitted to this Court for approval. Six months were allowed for public comment (from August 1991 to February 1992).²⁷ In the course of a six-month public comment period if this Court returns the rule, the Committee also concurrently could

²⁴ See *id.* (Advisory Committee Chairman notes that delay in adopting disclosure amendment will benefit from Civil Justice Reform Act experiments).

²⁵ See Judicial Conference of the U.S., Civil Justice Reform Act Report: Development and Implementation of Plans By Early Implementation Districts and Pilot Courts 2 (June 1, 1992) [hereinafter "CJRA Report"].

²⁶ See May 1, 1992 Transmittal Letter from Sam C. Pointer, Chairman, Advisory Committee on Civil Rules, to Honorable Robert E. Keeton, Chairman, Standing Committee on Rules of Practice and Procedure, Attachment B, "Issues and Changes," at 7; Committee Notes on November 1992 Amendments, supra note 1 at 95; see also Panel Flips, supra note 4.

²⁷ See Transmittal Letter Accompanying August 1991 Amendments, Comm. on Rules of Practice and Procedure, Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence (August 1991) [hereinafter "August 1991 Amendments"].

solicit preliminary results from the CJRA experiments, which now have been in effect for one full year. If the Committee then takes six to eight months to consider the new information collected and to arrive at a Rule 26 reform more consistent with public opinion and practical experience, the revised amendment could be returned to the Court by early 1994, forwarded to Congress by the statutory cut-off of May 1994, with a potential effective date of December 1, 1994 -- a delay of only one year's time.²⁸

A delay in implementation of the disclosure amendment also will ameliorate potential conflicts between the Committee's reforms and the CJRA experiments. Although the Committee's proposed rule permits the experimental districts to opt out of proposed Rule 26(a)(1) disclosure in favor of a different local experimental plan, nationwide imposition of the Committee's disclosure proposal inevitably will undermine the vitality of the experimental plans. Once the Committee's disclosure proposal is in effect nationally, even the very best experimental disclosure plan is unlikely to be adopted nationally to supersede the Committee's already-implemented version of disclosure. The inertia and practical problems connected with replacing one national disclosure process with another, just as the bench and bar are starting to become accustomed to the first, would be insurmountable.

Failure to give full consideration to the best plans to emerge from the experimental districts would fly in the face of Congress' mandate and be in direct conflict with the core purpose of the experimental plans, which is to test, identify, and implement the very best reform proposals. The only means of reconciling the two tracks of discovery

²⁸ See, e.g., S. Rep. No. 1277, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. and Admin. News 7051, 7052 (revised rules returned to Supreme Court one year from court remand to solicit public comment); see also 28 U.S.C.A. § 2074 (West Supp. 1992).

reform now ongoing in the federal courts is to incorporate results from the CJRA experiments into the federal rules at a time when their incorporation will be meaningful. If discovery reforms cannot be delayed until the CJRA experiments are concluded fully in 1995, the reforms undertaken now at least should reflect information already produced in the CJRA experiments during the first year. Such information would at least reveal whether disclosure, in any of its various forms, is a workable concept. In the views of the organizations submitting this memorandum, it is not.

III. Disclosure Is A Flawed Concept.

The Rules Committee's commitment to meaningful discovery reform, and its diligence in developing the pending amendments is obvious. Nonetheless, the belief that disclosure will lessen discovery abuse is based on little more than theory. In fact, disclosure is likely to create new problems not previously experienced in discovery.²⁹ The Committee Notes indicate that the disclosure rule is derived from theories advanced over the years by two respected jurists.³⁰ The original disclosure theories, however, would have replaced discovery entirely. In contrast, the disclosure process now before the Court grafts another layer onto the pretrial process as a prelude to discovery. Thus, the arguments that

²⁹ As one commentator put it, the Advisory Committee's decision to put its faith in the proposed disclosure process, without hard evidence that disclosure could work, is a "triumph of hope over experience." Mullenix, supra note 22, at 820.

³⁰ Committee Notes, November 1992 Amendments, supra note 1, at 94, citing Brazil, The Adversary Character of Civil Discovery: A Critique and Proposal For Change, 31 Vand. L. Rev. 1348 (1978); Schwarzer, The Federal Rules, The Adversary Process, and Discovery Reform, 50 U. Pitt. L. Rev. 703 (1989); see Schwarzer, Slaying The Monsters of Discovery Cost and Delay: Would Disclosure Be More Effective Than Discovery?, 74 Judicature 178 (1991).

supported the original disclosure theories do not provide even slight theoretical support for the proposed disclosure amendment. Conspicuously absent from the public comments on the proposed disclosure process is support for the disclosure concept from practicing lawyers and their clients -- those who bear the costs and burdens of the present discovery system. The fact that disclosure as a concept failed to produce any significant support, much less advocates, from among the practicing bar signals a need for reexamination of the basic disclosure concept.

As a threshold matter, the disclosure standard is unacceptably vague. It fails to describe a party's disclosure obligation with sufficient clarity and specificity to allow a party to make disclosure with any certainty of compliance. Second, disclosure will cause unnecessary, burdensome costs and delays, primarily by precipitating satellite litigation. Finally, disclosure conflicts with the ethical obligations of lawyers to their clients under the adversary system, adversely affecting the attorney-client relationship and the work product doctrine.

A. The Ambiguity Of The Disclosure Standard Will Confound Efforts To Comply With It.

The standard for disclosure contained in the pending amendment requires each party, in advance of a formal request, to identify to an opponent all witnesses and to describe "by category" documents "relevant" to "disputed facts alleged with particularity in the pleadings."³¹ None of these three key terms can be defined objectively, in advance, by a party intent on making a meaningful disclosure that complies with the terms of the Rule.

³¹ See Proposed Rule 26, November 1992 Amendments, *supra* note 1, at 72-73.

The term "category" can range from the very broad (e.g., "engineering drawings") to the very specific (e.g., engineering layout drawings showing the location of one part of a product manufactured in a specific year). "Relevancy" is a commonly litigated concept; it currently breeds more satellite litigation in discovery than any other -- a harbinger that it will lead to just as much contentiousness in pre-discovery disclosure.³² Disputes over which allegations are pled with sufficient "particularity" to trigger disclosure also are certain to arise. "Particularity" -- a broad concept at best -- is not a self-defining term, as the substantial body of case law on pleading fraud with "particularity" under Rule 9(b) demonstrates.³³

B. The Proposal Will Encourage Unnecessary Satellite Litigation.

Because of the uncertainty surrounding the scope of the disclosure obligation, and concerns regarding privilege and the lawyer's ethical obligations, conscientious parties are likely to move for protective orders or to turn to other motion practice to define their disclosure obligations with greater certainty. As a result, satellite litigation is certain to increase, even before disclosures are made.

More motion practice will increase the burdens on already overworked courts and court personnel, primarily at the trial court level, but also at the appellate level as the ambiguities and vagaries of the disclosure concept are resolved. In light of the strain the existing caseload already places on federal judges and courts, rules amendments should be

³² Cf. R.W. Int'l Corp. v. Welch Foods, Inc., 937 F.2d 11 (1st Cir. 1991) (plaintiff viewed discovery related to subsidiary as not relevant; trial court disagreed, awarding sanctions; appellate court reversed; disputes over relevancy most common in discovery).

³³ See, e.g., Ross v. Bolton, 904 F.2d 819 (2d Cir. 1990).

made only when they will reduce the workload, and not when they will increase it as disclosure almost certainly will.

Sanctions litigation under Rule 37(b) also is likely to increase against parties who have attempted in good faith, but perhaps unsuccessfully, to meet their vaguely defined disclosure obligations. The sanctions now available under Rule 37, as revised by the Committee, are severe because the proposed Rule 37(b) amendment equates inadequate disclosure with failure to comply with a court order under the present discovery rules. Either violation can trigger the ultimate sanction -- default judgment. Yet, failure to comply adequately with an ambiguous, voluntary disclosure obligation would not and should not rise to the level of deliberate violation of a court order. Thus, it is difficult to discern a substantial relationship between the error of failing to disclose, and the sanction for that error as currently drafted in proposed Rule 26.

**C. The Proposal Distorts the Adversary Process
and Compels Disclosure of Attorney Mental
Impressions and Work Product.**

The proposed disclosure process more closely resembles procedures followed in the inquisitorial civil justice systems used in Western Europe and Japan than American jurisprudence.³⁴ Voluntary disclosure of information harmful to one's own case, without even a request for that information, is antithetical to any adversary system such as ours, which is premised on the belief that each side presents its best, not worst, case and the truth

³⁴ See Cortese & Blaner, Civil Justice Reform in America: A Question of Parity With Our International Rivals, 13 Univ. Pa. J. Int'l Bus. L. 1 (1992) (comparing civil justice systems in Germany, England and Japan with American civil justice system); see also Committee Notes, November 1992 Amendments, supra note 1, at 95 (United Kingdom and Canada require disclosure).

emerges from the clash of conflicting positions.³⁵ If adversity does not exist during the pretrial process, it substantially weakens the underpinnings for having adversity at trial -- a complex issue that the Committee did not, and indeed, could not fully consider.

The disclosure requirement also will create mischief in the attorney-client relationship. Clients do not, and should not, expect their own lawyers to search client files for self-destructive information only to dutifully turn it over to the adversary. By creating a disclosure obligation that runs from the attorney to the opponent, the proposed amendment creates an unavoidable conflict with the attorney's obligation to the client. Although the proposed disclosure process does not modify the attorney-client privilege directly, it will undermine essential aspects of the relationship that the privilege was created to protect.

Moreover, the proposed disclosure process is inconsistent with the policies underlying the work product doctrine. The very process of deciding what is "relevant" to disputed facts in the pleadings necessarily incorporates counsel's judgments and mental impressions based on investigations, strategies, and decisions regarding theories of the case. Requiring counsel to make disclosure requires counsel to disclose work product. Disclosure unavoidably may cause a party to reveal to an opponent a line of factual inquiry or legal reasoning that the opponent never would have considered or litigated on its own. Consequently, disclosure will expand the scope of each matter litigated instead of limiting it to the minimum. The work product doctrine was intended to protect and promote inventiveness, diligence, and excellence among attorneys. The disclosure process, which

³⁵ Cf. Brazil, supra note 30 at 1345 (discovery reform, such as disclosure, unlikely to be effective unless adversary nature of justice system is changed, including attorney's ethical obligations).

would force an attorney to reveal his thought processes early on in litigation, is antithetical to these goals.

The adversary nature of civil litigation in this country pervades all aspects of the civil justice system. Importation of a starkly non-adversarial procedure, such as disclosure, into this process will have far-reaching, largely unforeseen implications for the civil justice system as a whole -- implications that the Committee has not fully considered.³⁶

IV. Conclusion

If Rule 26(a)(1) moves forward at this time, it will weaken the integrity of the rules amendment process.³⁷ The unprecedented opposition to and lack of support for the proposed Rule 26(a)(1) disclosure amendment, the lack of a meaningful opportunity for public comment on the final proposal, and the numerous, significant flaws in the proposal all coalesce to provide compelling justification for returning Rule 26(a)(1) to the Committee

³⁶ See also Mullenix, supra note 22, at 820-21 (proposed disclosure rule "presents unresolved research issues as well as several lurking problems.") Brazil, supra note 30 at 1345.

³⁷ See A Legend Worries, supra note 13.

on Rules. We respectfully ask the Court to exercise its authority over the rules amendment process, to decline to approve proposed Rule 26(a)(1), and to remand the Rule to the Committee on Rules for additional public comment and reconsideration in light of experience with the CJRA experimental disclosure plans.

Respectfully submitted,

AMERICAN LEGISLATIVE EXCHANGE COUNCIL
ASSOCIATION OF DEFENSE TRIAL ATTORNEYS
BUSINESS ROUNDTABLE LAWYERS COMMITTEE
CHAMBER OF COMMERCE OF THE UNITED STATES
FEDERATION OF INSURANCE AND CORPORATE COUNSEL
INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL
LAWYERS FOR CIVIL JUSTICE
LITIGATION SECTION OF THE DISTRICT OF COLUMBIA BAR*
PUBLIC CITIZEN LITIGATION GROUP

* The views expressed herein represent only those of the Litigation Section of the District of Columbia Bar and not those of the D.C. Bar or of its Board of Governors.

APPENDIX A

RULES OF CIVIL PROCEDURE

519 of the case, the discovery already had in
520 the case, the amount in controversy, and
521 the importance of the issues at stake in
522 the litigation.

523 If a request, response, or objection is not
524 signed, it shall be stricken unless it is
525 signed promptly after the omission is called
526 to the attention of the party making the
527 request, response, or objection, and a party
528 shall not be obligated to take any action with
529 respect to it until it is signed.

530 (3) If without substantial justification
531 a certification is made in violation of the
532 rule, the court, upon motion or upon its own
533 initiative, shall impose upon the person who
534 made the certification, the party on whose
535 behalf the disclosure, request, response, or
536 objection is made, or both, an appropriate
537 sanction, which may include an order to pay
538 the amount of the reasonable expenses incurred
539 because of the violation, including a
540 reasonable attorney's fee.

COMMITTEE NOTES

Subdivision (a). Through the addition of paragraphs (1)-(4), this subdivision imposes on parties a duty to disclose, without awaiting formal

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discovery requests, certain basic information that is needed in most cases to prepare for trial or make an informed decision about settlement. The rule requires all parties (1) early in the case to exchange information regarding potential witnesses, documentary evidence, damages, and insurance, (2) at an appropriate time during the discovery period to identify expert witnesses and provide a detailed written statement of the testimony that may be offered at trial through specially retained experts, and (3) as the trial date approaches to identify the particular evidence that may be offered at trial. The enumeration in Rule 26(a) of items to be disclosed does not prevent a court from requiring by order or local rule that the parties disclose additional information without a discovery request. Nor are parties precluded from using traditional discovery methods to obtain further information regarding these matters, as for example asking an expert during a deposition about testimony given in other litigation beyond the four-year period specified in Rule 26(a)(2)(B).

A major purpose of the revision is to accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information, and the rule should be applied in a manner to achieve those objectives. The concepts of imposing a duty of disclosure were set forth in Brazil, The Adversary Character of Civil Discovery: A Critique and Proposals for Change, 31 Vand. L. Rev. 1348 (1978), and Schwarzer, The Federal Rules, the Adversary Process, and Discovery Reform, 50 U. Pitt. L. Rev. 703, 721-23 (1989).

The rule is based upon the experience of district courts that have required disclosure of some of this information through local rules, court-approved standard interrogatories, and standing orders. Most have required pretrial disclosure of the kind of information described in Rule 26(a)(3). Many have required written reports from experts containing information like that specified in Rule 26(a)(2)(B). While far more limited, the experience of the few state and federal courts that have required pre-discovery exchange of core information such as is contemplated in Rule 26(a)(1) indicates that savings in time and expense can be achieved, particularly if the litigants meet and discuss the issues in the case as a predicate for this exchange and if a judge

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supports the process, as by using the results to guide further proceedings in the case. Courts in Canada and the United Kingdom have for many years required disclosure of certain information without awaiting a request from an adversary.

Paragraph (1). As the functional equivalent of court-ordered interrogatories, this paragraph requires early disclosure, without need for any request, of four types of information that have been customarily secured early in litigation through formal discovery. The introductory clause permits the court, by local rule, to exempt all or particular types of cases from these disclosure requirement or to modify the nature of the information to be disclosed. It is expected that courts would, for example, exempt cases like Social Security reviews and government collection cases in which discovery would not be appropriate or would be unlikely. By order the court may eliminate or modify the disclosure requirements in a particular case, and similarly the parties, unless precluded by order or local rule, can stipulate to elimination or modification of the requirements for that case. The disclosure obligations specified in paragraph (1) will not be appropriate for all cases, and it is expected that changes in these obligations will be made by the court or parties when the circumstances warrant.

Authorization of these local variations is, in large measure, included in order to accommodate the Civil Justice Reform Act of 1990, which implicitly directs districts to experiment during the study period with differing procedures to reduce the time and expense of civil litigation. The civil justice delay and expense reduction plans adopted by the courts under the Act differ as to the type, form, and timing of disclosures required. Section 105(c)(1) of the Act calls for a report by the Judicial Conference to Congress by December 31, 1995, comparing experience in twenty of these courts; and section 105(c)(2)(B) contemplates that some changes in the Rules may then be needed. While these studies may indicate the desirability of further changes in Rule 26(a)(1), these changes probably could not become effective before December 1998 at the earliest. In the meantime, the present revision puts in place a series of disclosure obligations that, unless a court acts affirmatively to impose other requirements or indeed to reject all such requirements for the present, are designed to eliminate certain discovery, help focus

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documents desired by proceeding under Rule 34 or through informal requests. The disclosing party does not, by describing documents under subparagraph (B), waive its right to object to production on the basis of privilege or work product protection, or to assert that the documents are not sufficiently relevant to justify the burden or expense of production.

The initial disclosure requirements of subparagraphs (A) and (B) are limited to identification of potential evidence "relevant to disputed facts alleged with particularity in the pleadings." There is no need for a party to identify potential evidence with respect to allegations that are admitted. Broad, vague, and conclusory allegations sometimes tolerated in notice pleading--for example, the assertion that a product with many component parts is defective in some unspecified manner--should not impose upon responding parties the obligation at that point to search for and identify all persons possibly involved in, or all documents affecting, the design, manufacture, and assembly of the product. The greater the specificity and clarity of the allegations in the pleadings, the more complete should be the listing of potential witnesses and types of documentary evidence. Although paragraphs (1)(A) and (1)(B) by their terms refer to the factual disputes defined in the pleadings, the rule contemplates that these issues would be informally refined and clarified during the meeting of the parties under subdivision (f) and that the disclosure obligations would be adjusted in the light of these discussions. The disclosure requirements should, in short, be applied with common sense in light of the principles of Rule 1, keeping in mind the salutary purposes that the rule is intended to accomplish. The litigants should not indulge in gamesmanship with respect to the disclosure obligations.

Subparagraph (C) imposes a burden of disclosure that includes the functional equivalent of a standing Request for Production under Rule 34. A party claiming damages or other monetary relief must, in addition to disclosing the calculation of such damages, make available the supporting documents for inspection and copying as if a request for such materials had been made under Rule 34. This obligation applies only with respect to documents then reasonably available to it and not privileged or protected as work product. Likewise, a party would

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not be expected to provide a calculation of damages which, as in many patent infringement actions, depends on information in the possession of another party or person.

Subparagraph (D) replaces subdivision (b)(2) of Rule 26, and provides that liability insurance policies be made available for inspection and copying. The last two sentences of that subdivision have been omitted as unnecessary, not to signify any change of law. The disclosure of insurance information does not thereby render such information admissible in evidence. See Rule 411, Federal Rules of Evidence. Nor does subparagraph (D) require disclosure of applications for insurance, though in particular cases such information may be discoverable in accordance with revised subdivision (a)(5).

Unless the court directs a different time, the disclosures required by subdivision (a)(1) are to be made at or within 10 days after the meeting of the parties under subdivision (f). One of the purposes of this meeting is to refine the factual disputes with respect to which disclosures should be made under paragraphs (1)(A) and (1)(B), particularly if an answer has not been filed by a defendant, or, indeed, to afford the parties an opportunity to modify by stipulation the timing or scope of these obligations. The time of this meeting is generally left to the parties provided it is held at least 14 days before a scheduling conference is held or before a scheduling order is due under Rule 16(b). In cases in which no scheduling conference is held, this will mean that the meeting must ordinarily be held within 75 days after a defendant has first appeared in the case and hence that the initial disclosures would be due no later than 85 days after the first appearance of a defendant.

Before making its disclosures, a party has the obligation under subdivision (g)(1) to make a reasonable inquiry into the facts of the case. The rule does not demand an exhaustive investigation at this stage of the case, but one that is reasonable under the circumstances, focusing on the facts that are alleged with particularity in the pleadings. The type of investigation that can be expected at this point will vary based upon such factors as the number and complexity of the issues; the location, nature, number, and availability of potentially relevant

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witnesses and documents; the extent of past working relationships between the attorney and the client, particularly in handling related or similar litigation; and of course how long the party has to conduct an investigation, either before or after filing of the case. As provided in the last sentence of subdivision (a)(1), a party is not excused from the duty of disclosure merely because its investigation is incomplete. The party should make its initial disclosures based on the pleadings and the information then reasonably available to it. As its investigation continues and as the issues in the pleadings are clarified, it should supplement its disclosures as required by subdivision (e)(1). A party is not relieved from its obligation of disclosure merely because another party has not made its disclosures or has made an inadequate disclosure.

It will often be desirable, particularly if the claims made in the complaint are broadly stated, for the parties to have their Rule 26(f) meeting early in the case, perhaps before a defendant has answered the complaint or had time to conduct other than a cursory investigation. In such circumstances, in order to facilitate more meaningful and useful initial disclosures, they can and should stipulate to a period of more than 10 days after the meeting in which to make these disclosures, at least for defendants who had no advance notice of the potential litigation. A stipulation at an early meeting affording such a defendant at least 60 days after receiving the complaint in which to make its disclosures under subdivision (a)(1)--a period that is two weeks longer than the time formerly specified for responding to interrogatories served with a complaint--should be adequate and appropriate in most cases.

Paragraph (2). This paragraph imposes an additional duty to disclose information regarding expert testimony sufficiently in advance of trial that opposing parties have a reasonable opportunity to prepare for effective cross examination and perhaps arrange for expert testimony from other witnesses. Normally the court should prescribe a time for these disclosures in a scheduling order under Rule 16(b), and in most cases the party with the burden of proof on an issue should disclose its expert testimony on that issue before other parties are required to make their disclosures with respect to that issue. In the absence of such a direction, the disclosures are to be

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made by all parties at least 90 days before the trial date or the date by which the case is to be ready for trial, except that an additional 30 days is allowed (unless the court specifies another time) for disclosure of expert testimony to be used solely to contradict or rebut the testimony that may be presented by another party's expert. For a discussion of procedures that have been used to enhance the reliability of expert testimony, see M. Graham, Expert Witness Testimony and the Federal Rules of Evidence: Insuring Adequate Assurance of Trustworthiness, 1986 U. Ill. L. Rev. 90.

Paragraph (2)(B) requires that persons retained or specially employed to provide expert testimony, or whose duties as an employee of the party regularly involve the giving of expert testimony, must prepare a detailed and complete written report, stating the testimony the witness is expected to present during direct examination, together with the reasons therefor. The information disclosed under the former rule in answering interrogatories about the "substance" of expert testimony was frequently so sketchy and vague that it rarely dispensed with the need to depose the expert and often was even of little help in preparing for a deposition of the witness. Revised Rule 37(c)(1) provides an incentive for full disclosure; namely, that a party will not ordinarily be permitted to use on direct examination any expert testimony not so disclosed. Rule 26(a)(2)(B) does not preclude counsel from providing assistance to experts in preparing the reports, and indeed, with experts such as automobile mechanics, this assistance may be needed. Nevertheless, the report, which is intended to set forth the substance of the direct examination, should be written in a manner that reflects the testimony to be given by the witness and it must be signed by the witness.

The report is to disclose the data and other information considered by the expert and any exhibits or charts that summarize or support the expert's opinions. Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions--whether or not ultimately relied upon by the expert--are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.

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Revised subdivision (b)(4)(A) authorizes the deposition of expert witnesses. Since depositions of experts required to prepare a written report may be taken only after the report has been served, the length of the deposition of such experts should be reduced, and in many cases the report may eliminate the need for a deposition. Revised subdivision (e)(1) requires disclosure of any material changes made in the opinions of an expert from whom a report is required, whether the changes are in the written report or in testimony given at a deposition.

For convenience, this rule and revised Rule 30 continue to use the term "expert" to refer to those persons who will testify under Rule 702 of the Federal Rules of Evidence with respect to scientific, technical, and other specialized matters. The requirement of a written report in paragraph (2)(B), however, applies only to those experts who are retained or specially employed to provide such testimony in the case or whose duties as an employee of a party regularly involve the giving of such testimony. A treating physician, for example, can be deposed or called to testify at trial without any requirement for a written report. By local rule, order, or written stipulation, the requirement of a written report may be waived for particular experts or imposed upon additional persons who will provide opinions under Rule 702.

Paragraph (3). This paragraph imposes an additional duty to disclose, without any request, information customarily needed in final preparation for trial. These disclosures are to be made in accordance with schedules adopted by the court under Rule 16(b) or by special order. If no such schedule is directed by the court, the disclosures are to be made at least 30 days before commencement of the trial. By its terms, rule 26(a)(3) does not require disclosure of evidence to be used solely for impeachment purposes; however, disclosure of such evidence--as well as other items relating to conduct of trial--may be required by local rule or a pretrial order.

Subparagraph (A) requires the parties to designate the persons whose testimony they may present as substantive evidence at trial, whether in person or by deposition. Those who will probably be called as witnesses should be listed separately from those who

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are not likely to be called but who are being listed in order to preserve the right to do so if needed because of developments during trial. Revised Rule 37(c)(1) provides that only persons so listed may be used at trial to present substantive evidence. This restriction does not apply unless the omission was "without substantial justification" and hence would not bar an unlisted witness if the need for such testimony is based upon developments during trial that could not reasonably have been anticipated--e.g., a change of testimony.

Listing a witness does not obligate the party to secure the attendance of the person at trial, but should preclude the party from objecting if the person is called to testify by another party who did not list the person as a witness.

Subparagraph (B) requires the party to indicate which of these potential witnesses will be presented by deposition at trial. A party expecting to use at trial a deposition not recorded by stenographic means is required by revised Rule 32 to provide the court with a transcript of the pertinent portions of such depositions. This rule requires that copies of the transcript of a nonstenographic deposition be provided to other parties in advance of trial for verification, an obvious concern since counsel often utilize their own personnel to prepare transcripts from audio or video tapes. By order or local rule, the court may require that parties designate the particular portions of stenographic depositions to be used at trial.

Subparagraph (C) requires disclosure of exhibits, including summaries (whether to be offered in lieu of other documentary evidence or to be used as an aid in understanding such evidence), that may be offered as substantive evidence. The rule requires a separate listing of each such exhibit, though it should permit voluminous items of a similar or standardized character to be described by meaningful categories. For example, unless the court has otherwise directed, a series of vouchers might be shown collectively as a single exhibit with their starting and ending dates. As with witnesses, the exhibits that will probably be offered are to be listed separately from those which are unlikely to be offered but which are listed in order to preserve the right to do so if needed because of developments during trial. Under revised Rule 37(c)(1) the court can permit use of unlisted

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documents the need for which could not reasonably have been anticipated in advance of trial.

Upon receipt of these final pretrial disclosures, other parties have 14 days (unless a different time is specified by the court) to disclose any objections they wish to preserve to the usability of the deposition testimony or to the admissibility of the documentary evidence (other than under Rules 402 and 403 of the Federal Rules of Evidence). Similar provisions have become commonplace either in pretrial orders or by local rules, and significantly expedite the presentation of evidence at trial, as well as eliminate the need to have available witnesses to provide "foundation" testimony for most items of documentary evidence. The listing of a potential objection does not constitute the making of that objection or require the court to rule on the objection; rather, it preserves the right of the party to make the objection when and as appropriate during trial. The court may, however, elect to treat the listing as a motion "in limine" and rule upon the objections in advance of trial to the extent appropriate.

-- The time specified in the rule for the final pretrial disclosures is relatively close to the trial date. The objective is to eliminate the time and expense in making these disclosures of evidence and objections in those cases that settle shortly before trial, while affording a reasonable time for final preparation for trial in those cases that do not settle. In many cases, it will be desirable for the court in a scheduling or pretrial order to set an earlier time for disclosures of evidence and provide more time for disclosing potential objections.

Paragraph (4). This paragraph prescribes the form of disclosures. A signed written statement is required, reminding the parties and counsel of the solemnity of the obligations imposed; and the signature on the initial or pretrial disclosure is a certification under subdivision (g)(1) that it is complete and correct as of the time when made. Consistent with Rule 5(d), these disclosures are to be filed with the court unless otherwise directed. It is anticipated that many courts will direct that expert reports required under paragraph (2)(B) not be filed until needed in connection with a motion or for trial.

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Paragraph (5). This paragraph is revised to take note of the availability of revised Rule 45 for inspection from non-parties of documents and premises without the need for a deposition.

Subdivision (b). This subdivision is revised in several respects. First, former paragraph (1) is subdivided into two paragraphs for ease of reference and to avoid renumbering of paragraphs (3) and (4). Textual changes are then made in new paragraph (2) to enable the court to keep tighter rein on the extent of discovery. The information explosion of recent decades has greatly increased both the potential cost of wide-ranging discovery and the potential for discovery to be used as an instrument for delay or oppression. Amendments to Rules 30, 31, and 33 place presumptive limits on the number of depositions and interrogatories, subject to leave of court to pursue additional discovery. The revisions in Rule 26(b)(2) are intended to provide the court with broader discretion to impose additional restrictions on the scope and extent of discovery and to authorize courts that develop case tracking systems based on the complexity of cases to increase or decrease by local rule the presumptive number of depositions and interrogatories allowed in particular types or classifications of cases. The revision also dispels any doubt as to the power of the court to impose limitations on the length of depositions under Rule 30 or on the number of requests for admission under Rule 36.

Second, former paragraph (2), relating to insurance, has been relocated as part of the required initial disclosures under subdivision (a)(1)(D), and revised to provide for disclosure of the policy itself.

Third, paragraph (4)(A) is revised to provide that experts who are expected to be witnesses will be subject to deposition prior to trial, conforming the norm stated in the rule to the actual practice followed in most courts, in which depositions of experts have become standard. Concerns regarding the expense of such depositions should be mitigated by the fact that the expert's fees for the deposition will ordinarily be borne by the party taking the deposition. The requirement under subdivision (a)(2)(B) of a complete and detailed report of the expected testimony of certain forensic experts may,

APPENDIX B

SUMMARY OF COMMENTS ON RULE 26 DISCLOSURE

(comments received as of January 29, 1992)

A total of 101 comments were reviewed addressing the proposed amendment to Federal Rule of Civil Procedure 26 that would require disclosure of information in advance of discovery. Ninety-five percent of the comments were in opposition to the proposed disclosure process. Eight federal district court judges commented, and seven out of the eight were opposed to disclosure. The following is a summary of the primary objections against the proposal and a tally of the percentage of commenters who raised these objections.

<u>Specific Objections</u>	<u>Percent Commenting</u>
The standard for making disclosure, "likely to bear significantly" is too vague.	58
A disclosure process will spawn more satellite litigation and disputes.	50
The disclosure process will be unworkable under the notice pleading system.	49
The 30 day time limit for making disclosures after the answer is filed is too short.	43
Empirical data on disclosure is needed from the Biden bill districts before nationwide implementation.	37
Disclosure will result in much unnecessary and burdensome production of documents and information.	37
The disclosure process is inconsistent with the attorney-client relationship and will undermine the work product doctrine.	13
The disclosure process is inconsistent with the adversary system.	13
Simultaneous disclosure places an unfair burden on the defendant.	4

APPENDIX C

Formal Comments In Opposition To Rule 26
Submitted by Bar Associations, Business Associations, and Government Agencies

Alliance of American Insurers	Connecticut Bar Association
Alliance for Justice	Federal Practice and Litigation Sections
American Bar Association Section of Litigation Section of Antitrust Law Anthony R. Palermo, Secretary Admiralty and Maritime Litigation Committee	Defense Counsel of Delaware
American Board of Trial Advocates	Federal Bar Association, Los Angeles Chapter
American Civil Liberties Union	State Bar of Georgia
American College of Trial Lawyers	Hawaii Defense Lawyers Association
American Corporate Counsel Association	Idaho Association of Defense Counsel
American Institute of Certified Public Accountants	Illinois Association of Defense Trial Counsel
American Insurance Association	International Association of Defense Counsel
Arkansas Association of Defense Counsel	Iowa Defense Counsel Association
Association of American Railroads	U.S. Department of Justice
Association of Trial Lawyers	Lawyers for Civil Justice
Business Roundtable	Los Angeles County Bar Association
State Bar of California	Maritime Law Association of the United States
Central District of California Lawyer Representatives, Ninth Circuit Judicial Conference	Michigan Defense Trial Counsel, Inc. Mississippi Defense Lawyers Association
Chamber of Commerce of the United States	State Bar of Montana
Chicago Council of Lawyers	NAACP, Legal Defense and Educational Fund
Colorado Bar Association	National Association of Independent Insurers
	National Association of Railroad Trial Counsel
	New Jersey Defense Association
	New Jersey State Bar Association
	New York State Bar Association Commercial and Federal Litigation Section

Pharmaceutical Manufacturers Association

Philadelphia Bar Association

Product Liability Advisory Council

Public Citizen Litigation Group

South Carolina Defense Trial Attorneys'
Association

Trial Lawyers for Public Justice

Virginia Association of Defense Attorneys

Washington Defense Trial Lawyers

Washington Trial Lawyers Association

Wichita (Kansas) Bar Association

Formal Comments In Opposition To Rule 26
Filed By Corporations

American Standard Inc.	Cooper Tire & Rubber Company
Amoco Corporation	Deere & Company
ARCO	The Dow Chemical Company
Bausch & Lomb Inc.	Duquesne Light Company
Bethlehem Steel Corporation	E.I. DuPont de Nemours and Company
Bridgestone/Firestone, Inc.	Eastman Kodak Company
Caterpillar, Inc.	Emerson Electric Co.
Chesapeake Corporation	E-Systems, Inc.
The Clorox Company	Fina, Inc.
The Coca-Cola Company	Ford Motor Company
Control Data	Gates Energy Products
Corning Inc.	GenCorp

General Motors
Georgia-Pacific Corporation
Harley-Davidson, Inc.
Harris Corporation
Hershey Foods
Hughes Aircraft Company
Joy Technologies, Inc.
Lone Star Technologies
LTV Steel Company
Mazda Motor of America
McDermott, Inc.
McGraw-Hill, Inc.
Mead
Melroe Company
Michelin Tire Corporation
Mobil Corporation
Morgan Stanley & Co
Morton International
Murphy Oil USA, Inc.
Nalco Chemical Company
Nissan North America, Inc.
Olin Corporation
Oryx
Otis Elevator (United Technologies)
Phelps Dodge Corporation
Piper Aircraft Corporation
The Procter & Gamble Company
Ralston Purina Company
Raytheon
Sears, Roebuck and Co.
The Sherwin-Williams Company
Snap-On Tools
Sundstrand Corporation
Tenneco Inc.
The Timken Company
TRW Inc.
Union Carbide Corporation
The Uniroyal Goodrich Company
USX
Waltco Truck Equipment Co.
Washington Corporations
Zurn Industries, Inc.

Formal Comments Submitted by Attorneys and Judges

Robert J. Albair	Steven J. Cologne, McInnis, Fitzgerald, Rees, Sharkey & McIntyre
Arthur R. Almquist, Mehaffey & Webber	James J. Crowley, Thompson, Hine and Flory
Dan H. Ball, Thompson & Mitchell	Frank J. Daily, Quarles & Brady
S. Paul Battaglia, Bond, Schoeneck & King	D. Michael Dale, Oregon Legal Services
William C. Beatty, Huddleston, Bolen, Beatty, Porter & Copen	Roy B. Dalton, Martinez & Dalton, P.A.
James S. Bianchi, Myers, Bianchi & McConnell	Michael J. Danner, Danner & Bishop
Sheila L. Birnbaum, Skadden, Arps, Slate, Meagher & Flom	Jeffrey S. Davidson, Kirkland & Ellis
Peter K. Bleakley, Arnold & Porter	Donald H. Dawson, Jr., Plunkett & Cooney
T. Mack Brabham	Douglas K. Dieterly, Barnes & Thornburg
Kim R.I. Brogan, Epsten & Grinnell	Paul R. Devlin, Peabody & Arnold
Hon. Albert V. Bryan, Jr., United States District Court, Eastern District of Virginia	Gregory J. Digel, Branch, Pike Ganz & O'Callaghan
John C. Cahalan, Dunn, Carney, Allen, Higgins & Tongue	William L. Dorr, Harris Beach & Wilcox
Richard P. Campbell, Campbell & Associates	Winslow Drummond, The McMath Law Firm, P.A.
John M. Capron, Fisher & Phillips	Carroll E. Dubuc, Graham & James
James E. Carbine, Weinberg and Green	Charles R. Dunn, Dunn, Kacal, Adams, Pappas & Law
Gordon M. Carver III, Dunn, Kacal, Adams, Pappas & Law	Kevin J. Dunne, Sedgwick, Detert, Moran & Arnold
Walter Cheifetz, Cheifetz, Pierce, Cochran, Kozak & Mathew	M. Richard Dunlap, Dickie, McCamey & Chilcote
Douglas J. Chumbley, Popham Haik	Dale Ellis, Knowles, King & Smith
F. Bosley Crowther 3rd, Crowther & Bresee	John R. Fanone, Robert D. Kolar & Assoc.
Mary Coffey, The John J. Frank Partnership	

Francis X. Ferrara, Carpenter, Bennett & Morrissey

John P. Frank, Lewis and Roca

Charles F. Freiburger, Bricken & Eckler

Gail N. Friend, Fulbright & Jaworski

Keith Gerrard, Perkins Coie

Arthur M. Glover, Jr., Hisch, Glover, Robinson & Sheiness

Catherine A. Gofrank, Gofrank and Kelman

Hugh Q. Gottschalk, Otten, Johnson, Robinson, Neff & Ragonetti

Arthur P. Greenfield, Snell & Wilmer

Francis M. Gregory, Jr., Sutherland, Asbill & Brennan

Gregory A. Gross, Dickie, McCamey & Chilcote

Peter T. Grossi, Jr., Arnold & Porter

William D. Grubbs, Woodward, Hobson & Fulton

Harold A. Haddon, Debevoise & Plimpton

Patrick J. Hagan, Kincaid, Gianunzio, Caudle & Hubert

George N. Hayes, Delaney, Wiles, Hayes, Reitman & Brubaker

Thomas M. Hayes, Jr., Hayes, Harkey, Smith, Cascio & Mullens

Jon L. Heberling, McGarvey, Heberling, Sullivan & McGarvey

Jonathan M. Hoffman, Martin, Bischoff, Templeton, Langslet & Hoffman

Hon. H. Russel Holland, United States District Court, District of Alaska

Patrick E. Hollingsworth, Davidson, Horne & Hollingsworth

Charles W. Hosack, Lukins & Annis

Allen W. Howell, Shinbaum, Thiemonge & Howell

Hunton & Williams

Chester A. Janiak, Burms & Levinson

Hon. James H. Jarvis II, United States District Court, Eastern District of Tennessee

Lawrence R. Jensen, Hallgrimson, McNichols, McCann & Inderbitzen

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Brian N. Johnson, Popham Haik Schnobrich & Kaufman, Ltd.

Gregory P. Joseph, Fried, Frank, Harris, Shriver & Jacobson

Bruce W. Kauffman, Dilworth, Paxson, Kalish & Kauffman

M. J. Keefe

Loren Kieve, Debevoise & Plimpton

Harold E. Kohn, Kohn, Savett, Klein & Graf

Kenneth A. Kraus, Kraus & Kraus

Ernest Lane, III, Lane & Striebeck, P.A.

J.D. Ledbetter, Sommers, Schwartz, Silver & Schwartz

- Paul R. Leitner, Leitner, Warner, Moffitt,
Williams, Dooley, Carpenter & Napolitan
- Edwin L. Lowther, Jr., Wright, Lindsey &
Jennings
- Jack B. McCowan, Jr., Gordon & Rees
- Andrew T. McKinney, IV, Phillips & Akers
- Richard McMillan, Jr., Crowell & Moring
- John O. Miller, White, Huseman, Pletcher &
Powers
- Francis H. Morrison III, Day, Berry & Howard
- Ronald G. Morrison, Morrison & Leveque
- Hon. J. Frederick Motz, United States District
Court, District of Maryland
- Arthur Nakazato, Kircher & Nakazato
- Janet Napolitano, Lewis and Roca
- Marc A. Nerenstone
- Colvin G. Norwood, Jr., McGlinchey, Stafford,
Cellini & Lang
- Henry J. Oechler, Jr., Chadbourne & Parke
- Michael E. Oldham, Johnson, Oldham &
Angell
- Godfrey P. Padberg, Padberg, McSweeney,
Slater & Merz
- Hon. Owen M. Panner, United States District
Court, District of Oregon
- Deana S. Peck, Streich Lang
- Thomas M. Peters, Vandevener Garzia, P.C.
- Richard Polley, Dickie, McCamey & Chilcote
- Robert W. Powell, Dickinson, Wright, Moon,
Van Dusen & Freeman
- Clifford A. Rieders, Rieders, Travis, Mussina,
Humphrey & Harris
- Robert S. Rosemurgy, Butch, Quinn,
Rosemurgy, Jardis, Bush, Burkhart & Strom
- William A. Rossbach, Rossbach & Whiston,
P.C.
- Susan Vogel Saladoff
- Hon. Barefoot Sanders, United States District
Court, Northern District of Texas
- W. Joseph Schleppe, McCutchan, Druen,
Haynard, Rath & Dietrich
- Edward C. Schmidt, Jones, Day, Reavis &
Pogue
- Karl E. Seib, Jr., Patterson, Belknap, Webb &
Tyler
- William D. Serritella, Ross & Hardies
- Roger S. Shafer
- Samuel M. Shapiro
- Joseph A. Sherman, Sherman, Taff & Bangert
- Alan C. Stephens, Thomsen and Stephens
- John D. Stephenson, Jr., Jardine, Stephenson,
Blewett & Weaver, P.C.
- J. Hamilton Stewart, III, Ogletree, Deakins,
Nash, Smoak & Stewart
- Laura D. Stith, Shook, Hardy & Bacon
- Paul L. Stritmatter, Stritmatter, Kessler &
McCauley
- William H. Sutton, Friday, Eldredge & Clark

Michael E. Tigar, Debevoise & Plimpton

Thomas F. Tobin, Baker & McKenzie

Jay H. Tressler, Tressler, Soderstrom, Maloney
& Priess

Windle Turley, P.C.

H. Woodruff Turner, Kirkpatrick & Lockhart

George Vernon, Leng Stowell Friedman &
Vernon

Robert N. Weiner, Arnold & Porter

Ronald E. Westen, Harvey, Kruse, Westen &
Milan, P.C.

Tybo Alan Wilhelms, Bugbee Conkle

Shelton C. Williams, Williams & Ranney, P.C.

Anthony J. Willriott, Dickie, McCamey &
Chicote

Stanley P. Wilson

James D. Wing, Fine Jacobson Schwartz Nash
Block & England

Holly Winger, Cummings & Lockwood

Thomas D. Yannucci, Kirkland & Ellis

Andrew S. Zettle, Huddleston, Bolen, Beatty,
Porter & Copen

FEDERAL COURT WATCH

BY ANN PELHAM

Panel Flips, OKs Discovery Reform



Judge Ralph Winter initiated reconsideration of the panel's earlier vote to abandon reform of discovery in civil cases.

A far-reaching and controversial proposal designed to force litigants into early exchange of information in civil cases had been approved by a key federal judicial panel.

The requirement for mandatory disclosure had driven such opposition from both the plaintiffs and defense bars that the Advisory Committee on Civil Rules had backed off from the idea in February. But in a surprising about-face, the 11-member panel of judges, practitioners, and academics voted unanimously April 15 to endorse the reform.

Judge Ralph Winter of the U.S. Court of Appeals for the 2nd Circuit initiated the reconsideration of the earlier vote. Before the meeting, held at the Federal Judicial Center in Washington, he lined up support from a majority of his fellow panel members for a new, revised version of mandatory disclosure.

"There will be resistance [to discovery reform] so long as some lawyers are paid by the hour," Winter told the committee. But there is also widespread dissatisfaction with the status quo, "and this committee has the principal responsibility for reform," Winter said.

Voluntary disclosure signals a "significant change in philosophy," added committee member James Powers of Phoenix's Fenestrom Craig. "Instead of having lawyers spend years trying to hide the existence of a letter, we're saying, 'Put it on the table today.'"

The change in Rule 26 would require initial, voluntary disclosure of all information "relevant to disputed facts alleged with particularity in the pleadings," as well as a calculation of damages and information about insurance coverage. The requirement has teeth because documents or witnesses improperly kept secret could not be used as trial.

The committee abandoned an earlier, much broader definition that called for disclosure of anything that "bears significantly on a claim or defense."

The new wording resolves some concerns among practitioners, who worried that the broader definition would force them to reveal legal theories and attorney-client communications. However, widespread opposition is still expected to this and other proposed changes, such as limits on depositions and interrogatories and a requirement that each expert witness write a report. (See "Judges Make Quite a Discovery," Legal Times, March 16, 1992, Page 1.)

"What they did was adopt a somewhat improved reformulation of a basically flawed concept," says Alfred Cortese Jr. of the D.C. office of Chicago's Kirkland & Ellis, who attended the panel's meetings and has testified on behalf of the U.S. Chamber of Commerce and Lawyers for

Civil Justice, a defense and corporate counsel group. "They've selected the wrong method [for improving the process]—a method opposed by almost all of their customers."

Those unhappy "customers" include the public-interest bar, which believes the panel's latest version of mandatory disclosure—and its new limits on depositions and interrogatories—will hurt plaintiffs.

"This cuts down on plaintiff's ability to use discovery to find out what's going on," says Michael Tankersley, a staff attorney at Public Citizen Litigation Group.

The advisory committee now forwards its recommendations to the Judicial Conference's Standing Committee on Rules of Practice and Procedure, which meets in June and is chaired by U.S. District Judge Robert Keeton of Massachusetts. Under the Rules Enabling Act, proposed changes then go to the Judicial Conference, the Supreme Court, and eventually to Congress. The legislators have 90 days to vote to reject the rules changes; otherwise, they take effect. In this case, the changes could be in place before Dec. 1, 1993.

Although the advisory committee's work is usually accepted by the various layers of authority, this set of reforms is the most controversial ever proposed—and may not get the traditional rubber stamp.

Critics could end up taking their fight to Congress, thus politicizing a process that the judiciary has sought to keep neutral.

But if the advisory panel had rejected substantial reform, the judiciary's central role in rule-making could have been placed at risk. Congressionally mandated experiments in civil justice reform are already under way in each federal district, and the Bush administration is also pushing reforms.

The advisory committee had in fact hesitated to set a national disclosure rule until the local reform plans, required by the Civil Justice Reform Act of 1990, had been implemented and assessed. After public hearings in Atlanta in mid-February, where numerous critics urged a delay in national rules changes, the advisory committee voted to postpone action.

By early April, though, Winter and several other panel members had had second thoughts and began talking by telephone about another vote. On April 8, a letter calling for reconsideration was sent to Chief Judge Sam Pointer Jr. of the Northern District of Alabama, who chairs the advisory panel. The committee members ignoring, along with Winter, were Powers, the Phoenix lawyer; Judge J. Dickson Phillips Jr. of the 4th Circuit; Magistrate Judge Wayne Brazil of the Northern District of California; Dennis Linder, director of

federal programs in the Justice Department's Civil Division, and Mark Nordenberg, dean of the University of Pittsburgh School of Law.

At the panel's April 14 session in Washington, the rebels quickly picked up support from Judge Joseph Searles Jr. of the Western District of Missouri.

"I think we are making a serious mistake in delaying the work of this committee for some experimental, temporary, and perhaps futile work undertaken at the behest of Senator Biden and his committee," said Searles, referring to Senate Judiciary Chairman Joseph Biden Jr., who wrote the Civil Justice Reform Act. "I had the feeling they didn't even know we were over here" when the legislation was being considered.

Phillips, the 4th Circuit judge, noted the panel's years-long consideration of rules changes. "Nobody else has had the opportunity to think about this thing with as much depth as we have," said Phillips. "I think we have an obligation. To fail to do so would put the whole of the national amendment process back to 1996, and we might not do it." Phillips was alluding to the judiciary's lengthy, formal rule-making process. Linder, the Justice Department official, lamented the bar's reluctance to change the culture of litigation.

"If this committee is perceived as backing away, that resistance is going to increase dramatically," said Linder.

"It's already happened," interrupted Brazil.

As for the opposition from lawyers, Winter suggested they had the wrong impression.



Chief Judge Sam Pointer Jr. found his colleagues had changed their minds.

"We aren't saying you have to turn over a smoking gun or a privileged document," he told the panel. Lawyers must identify categories of documents, but can still claim that a document is protected by attorney-client privilege, as a trade secret, or for other reasons, he explained.

Chairman Pointer, faced with a majority seeking reconsideration, was amenable and focused on the practical aspects of requiring disclosure. "How can we do it in a way that is most workable?" Pointer asked.

Carol Fines, a partner in Springfield, Ill.'s Giffin, Winnick, Cohen & Bodewes, suggested that only information favorable, not adverse, to a lawyer's position be provided to the other side. "It's much easier to be true with your own case," she said.

But her approach was rejected in an 8-1 vote. After much discussion of wording changes, Pointer agreed to draft a new version of Rule 26. The next day, on April 15, the panel voted unanimously to adopt Pointer's proposal.

"Federal Court Watch" appears alternately in this space with "Supreme Court Watch."

91-258

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FEDERAL COURT WATCH

BY ANN PELHAM

Judge Takes On U.S. Attorney With New Sentencing Issue

One of the more establishment-minded members of the federal bench here has challenged Congress and the U.S. Sentencing Commission over application of federal sentencing guidelines in the District of Columbia.

In justifying his decision to cut a drug defendant's sentence by almost 10 years, Judge Thomas Penfield Jackson cited U.S. Attorney Jay Stephens' dual role in both local and federal prosecution and suggested that it had not been considered when the guidelines were crafted.

The U.S. attorney in the District is "able to exercise far greater control than his counterparts elsewhere over the prison time a defendant will



Thomas Penfield Jackson

Frank Dave Clark, who was convicted of possession with intent to distribute 9.22 grams of crack cocaine—less than a third of an ounce.

Although other judges have been troubled by Stephens' dual role, suggesting that local criminals are too readily charged with federal crimes, Jackson is apparently the first to call the U.S. attorney's "multiplying factor" in justifying a departure from the sentencing guidelines.

The judge, appointed to the bench in 1982 by President Ronald Reagan, also cited the "extraordinarily dismal childhood and adolescence" of defendant Clark and the local nature of his earlier crimes, which under the guidelines required that he be considered a "career criminal" and subject to several years' additional time in prison.

The latter points had been made by Assistant Federal Public Defender Michael Wallace, who represented Clark and sought a reduced sentence. Precedent with Jackson's view that the prosecutor was also a factor, Wallace readily endorsed that argument as well.

"In another state, these kinds of cases are not going to get shuffled from local to federal court," says Wallace.

Jackson agrees. "Unless and until Congress and the Sentencing Commission make it expressly clear that it is truly the penal policy of the United States to cause the incarceration of petty local offenders, particularly in the District of Columbia, until they are too old and infirm to transgress again, no matter how commonplace their 'career criminal' records may be, it should be open to a federal court in the District of Columbia to sentence compassionately for comparable crimes having neither a federal connection nor any extraordinary importance," Jackson wrote.

Jackson had brought up the Clark case, without naming the defendant, during the question-and-answer period following a June 11 panel on sentencing guidelines at the D.C. Circuit's Judicial Conference in Williamsburg, Va. The guidelines, he explained, clearly called for a 30-year sentence. "What do I do with a guy who is going to get 30 years for 9.2 grams of

crack, and how am I going to live with myself?" asked the judge.

Jackson managed to find a way to reduce the sentence, now the question is whether the government will challenge his reasoning on appeal.

Mark Luedi, spokesman for the U.S. attorney's office, says on occasion an appeal has been made. But he took issue with Jackson's ruling. "We believe that a defendant with six felony convictions in the last 10 years, including manslaughter, robbery, drug distribution, and weapons crimes, has demonstrated a career of serious criminality which warrants the maximum sentence provided by Congress."

A Legend Worries

Charles Alan Wright is nothing short of a legend in the world of federal procedure. A constitutional-law professor at the University of Texas at Austin, he is author of the basic federal-procedure text and holder of not one but two distinguished chairs at the university.

None of this carried much weight, though, when the Judicial Conference's Committee on Rules of Practice and Procedure recently voted 9-1 to approve a controversial proposal to reform discovery in federal civil litigation. Wright cast the lone vote against a new requirement for pre-discovery disclosure of information by both plaintiff and defendant—a reform that supporters hope will shorten the expensive, often protracted early stage of litigation.

Now the proposal goes on to the Judicial Conference, which meets in September, then to the Supreme Court, and finally, in 1993, to Congress, which has the power to veto the new rule.

"Though I tended to favor the rule on its merits," Wright says, explaining his June 20 vote, "I thought there was so much controversy, such strong opposition from both sides of the bar, that going forward would put the Supreme Court in a difficult position. They have enough controversial constitutional questions, we ought not to get them into hot water over discovery rules."

But his colleagues believe that the Rules Committee will be in hot water if nothing is done to reform discovery. Critics like Vice President Dan Quayle are pushing for major change, and Sen. Joseph Biden Jr. (D-De) has already pushed



through the Civil Justice Reform Act, which requires civil-justice reform plans in every district. Waiting any longer, the other committee members reason, could leave the judiciary and its rule-making process in disarray.

For Wright, the greater risk to this process, in place since 1938, is moving ahead with a change opposed by lawyers of all stripes. If they find that judicial rule-making, traditionally more academic than political, is not responsive to their concerns, Wright predicts, lawyers will seek a veto of the rules from Congress, where lobbying is not colored by the awkwardness many lawyers feel when they approach judicial bodies.

"I really worry that if we send this prematurely, we will jeopardize the continued existence of the

court rule-making process," warns Wright, who has had one of the hottest associations with the Rules Committee of any current member or perhaps any person ever. He first served the committee as an assistant reporter in the early 1950s and then as a member from 1964 to 1976, his current stint began in 1986.

Adding to Wright's worries is a proceduralist's dilemma: opponents are likely to make the version of the discovery reform, Rule 26, now pending before the Judicial Conference was never offered for public review. The Advisory Committee on Civil Rules, which reports to the Rules Committee, offered a draft for public comment in August 1991, but it drew so much strong opposition that the panel backed off in February. The panel reconsidered in April, however, and its revisions forwarded the discovery reform to the Rules Committee. (See "Panel Flips, OKs Discovery Reform," April 20, 1992, Page 6.)

"That's a good lever with which to argue to Congress," against approving the recommended version, Wright points out.

In fact, that strategy has already been used by the National Chamber Litigation Center, which reiterated its opposition in a June 11 letter addressed to U.S. District Judge Robert Keeton of Massachusetts, who chairs the Rules Committee.

"This new proposal was drafted overnight and was not circulated for public comment," wrote Stephen Bokor, Bokor's vice president of the center, who also spoke for the Product Liability Advisory Council and a task force of the Business Roundtable. "Thus, none of the individuals, associations, or businesses that commented on the original proposal has had any meaningful opportunity to comment on the new one."

The advisory panel's revisions, however, were designed to answer complaints by Bokor's group and others about vague, overly broad requirements they say would increase, not reduce, the expense of litigation. Each side would have to provide a list of witnesses and a description, by category, of documents relevant to "disputed facts alleged with particularity in the pleadings," according to the proposal. There's a loophole, though: A District Court could vote to exempt itself from the mandatory-disclosure provision, even if it did not have to place its own version of early disclosure as suggested by the Civil Justice Reform Act.

These revisions satisfied most members of the Rules Committee, but came up with a pretty good compromise, says William W. Wilson, a committee member and a partner in Little Rock, Ark. Wilson, Enstrom, Corum & Dudley. As for the business community's concerns, Wilson offers, "I think they've gotten a little overzealous."

Although the Rule 26 change is the most controversial, the Rules Committee also modified Rule 11, the sanctions provision. Instead of saying that a judge "shall" sanction a litigator who acts improperly, the proposed revision would give a judge more discretion by replacing "shall" with "may." The committee also reworded the rule to clarify that sanctions should be paid to the court, with costs and fees only rarely awarded to the opposing side.

Another hotly debated proposal—a revision of Rule 702 of the Federal Rules of Evidence, which covers expert witnesses—was not approved; the committee instead suggested that a new advisory panel on evidence be created and that it consider the Rule 702 revision.

The best target for critics of the discovery reform is the Judicial Conference, which consists of the chief judge and a district judge from each circuit. Chief Justice William Rehnquist chairs the group.

Just one witness sits on both the Rules Committee and the Judicial Conference: Chief Judge Dikorsky of the U.S. Court of Appeals for the 3rd Circuit. But she probably won't be carrying water for the rules panel come September, when the conference meets. After expressing concerns similar to Wright's during the discussion of mandatory disclosure, Sloviter chose to abstain from the vote.

"Federal Court Watch" appears alternately in this space with "Supreme Court Watch."

APPENDIX 9.—LETTER FROM WEBSTER L. HUBBELL, ASSOCIATE ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE, TO HON. WILLIAM J. HUGHES, CHAIRMAN, JUNE 25, 1993

U.S. Department of Justice

Office of the Associate Attorney General

RECEIVED

The Associate Attorney General

Washington, D.C. 20530

Sub on Courts

June 25, 1993

The Honorable William J. Hughes
Chairman
Subcommittee on Intellectual
Property and Judicial
Administration
House Judiciary Committee
207 Cannon House Office Building
Washington, D.C. 20515

Dear Chairman Hughes:

On June 16, 1993, your Subcommittee held a hearing on an extensive package of federal civil rules amendments, transmitted to Congress by the Supreme Court on April 22, 1993. As you may know, the Department of Justice in February of 1992 submitted formal comments as to certain of the civil rules amendments during their development and consideration by the Civil Rules Advisory Committee and the Standing Rules Committee. These comments were focused in large part on the Committees' efforts to streamline the civil litigation process and to curb abuses of discovery. At this time, I wish to communicate the Department's current position on these issues.

First, the Department of Justice wishes to reaffirm its support for reform of the discovery and pretrial processes to reduce delay and expense. In particular, proposed Rule 16, which concerns scheduling conferences and scheduling orders, should lead to substantial improvements in the judicial management of civil cases. Similarly, the presumptive limits on discovery proposed in Rules 30, 31 and 33 should promote reductions in discovery costs without sacrificing the fair adjudication of civil cases.

Second, the Department has conducted a further evaluation of its position on the two most controversial aspects of the civil rules proposals -- Rule 11 and Rule 26(a)(1). With respect to Rule 11, we reaffirm our support for the revised Rule and urge that it be allowed to go into effect. With respect to Rule 26(a)(1), however, we have concluded that a rule mandating pre-discovery disclosure is not prudent or in the best interest of the United States. Any such rule should be deleted or at a

minimum deferred past December 31, 1995, when local rules experiments conducted under the auspices of the Civil Justice Reform Act of 1990 have been concluded. If not deleted, then the issue can be studied further, and the question of mandatory disclosure itself, as well as the terms of any such proposed rule, can be evaluated in light of the experiences of the 1990 Civil Justice Reform Act. We are concerned that the imposition of the rule at this time, while local ruler experiments are in place, will defeat the purpose of the Civil Justice Reform Act of having diverse "laboratories" to test possible litigation reforms.

We recognize that in keeping with President Bush's Council on Competitiveness the Department previously supported the proposed revisions to Rule 26(a)(1). We must further recognize, however, that organizations as diverse as the American Bar Association, American Trial Lawyers Association, American College of Trial Lawyers, Lawyers for Civil Justice, American Civil Liberties Union, NAACP Legal Defense and Educational Fund and International Association of Defense Counsel, as well as numerous other groups, legal scholars and trial judges have vehemently opposed the proposed rule. We wish to now add the United States Department of Justice to that list and recommend that proposed Rule 26(a)(1) be deleted or at a minimum deferred until after results of the 1990 Civil Justice Reform Act are received and studied.

Very truly yours,

Webster L. Hubbell
Associate Attorney General

APPENDIX 10.—LETTER FROM WAYNE D. BRAZIL, U.S. MAGISTRATE,
U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFOR-
NIA, TO HON. WILLIAM J. HUGHES, CHAIRMAN, JUNE 11, 1993

United States District Court
Northern District of California
430 Golden Gate Avenue — Box 36008
San Francisco, California 94102

11-1993

U.S. 11-1993

(11) 338-2412

(11) 338-2412

Signature of

Wayne D. Brazil

United States Magistrate

June 11, 1993

The Honorable William J. Hughes
Chairman
Subcommittee on Intellectual Property and Judicial Administration
United States House of Representatives
Washington, D.C. 20515-6219

Re: Proposed Amendments to the Federal Rules of Civil Procedure

Dear Congressman Hughes:

I write to respond to criticisms of certain amendments to the Federal Rules of Civil Procedure that have been presented by the Judicial Conference of the United States and the Supreme Court to Congress. The focus of this letter will be on the disclosure/discovery management system in proposed amendments to Rules 26 - 37. While I have served on the Judicial Conference's Advisory Committee on Civil Rules for several years, I write here as an individual.

As you are fully aware, there is overwhelming support for the proposition that current approaches to pretrial processes in civil litigation are unjustifiably expensive and time-consuming, jeopardizing economical access to justice and the competitiveness of American industry. And as the Louis Harris study showed, most of the blame is placed squarely on the discovery process - which is riddled with inefficient frictions and tactical delays. (Louis Harris and Associates, Inc., Procedural Reform of the Civil Justice System, March 1989). Meaningful change is long overdue.

The changes contemplated in the proposed amendments have a straight-forward purpose: to encourage counsel to get the core information about their case on the table directly and early, without resorting to the expensive and time-consuming processes of formal discovery, and to really talk to one another, directly and early, about sensible ways to position their case efficiently for disposition by settlement, motion, or trial.

Why these straight-forward proposals have inspired negative reactions in some high-visibility quarters remains something of a mystery. It is not clear why getting the core information on the

table directly and early, and talking about the case, should be considered antithetical to the American way or the administration of justice. I fear that either ignorance of the real content of the proposed changes or a desire to protect undeserved advantages in litigation may be driving the opposition to these proposals. To try to focus the debate on what the proposed amendments really are, I would like to respond to the most visible criticisms of them.

1. Criticism: The disclosure system would be unworkable.

Responses:

(a) The shortest response to this criticism is that several courts already have implemented systems like the system proposed in the amendments and they work.

(b) The Northern District of California implemented a similar system on July 1, 1992. That system applies to virtually all the mainstream civil cases in our court, which serves a metropolitan population of more than 7,000,000 that generates at least its fair share of complex, high-tech litigation. The sky has not fallen. Lawyers and litigants are complying with the disclosure rules. And even though we hired a lawyer to monitor implementation of the system, and publicized her availability to answer questions and receive complaints, there have been few complaints. Moreover, our disclosure system has not resulted in a flurry of motion activity; in fact, we have detected no increase at all in motion activity. Nor has any instance been brought to our attention where the rule has caused a party to wastefully produce more information than is justified by the needs of the case. Nor has any lawyer had to commit adversarial suicide.

(c) There are other courts that have had positive experiences with various forms of mandatory disclosure: e.g., the United States District Courts in Western Kentucky (Judge Bertelsman), South Carolina, the Southern District of Florida, and the Central District of California (Los Angeles and its environs), as well as the state courts of general trial jurisdiction in Arizona.

2. Criticism: The amendments would "subject the entire federal judicial system at once" to a rigid approach.

Responses:

(a) The amendments explicitly permit every federal court in the country to opt-out of the new system, to retain the system that is in place right now, or to experiment, as mandated in the Civil Justice Reform Act of 1990 (CJRA), with other approaches to cost and delay reduction. Proposed Rules 26(a)(1) and 26(a)(2)(B).

(b) As an alternative, the proposed rules and notes provide that courts also could exempt whole categories of cases from the disclosure system.

(c) The amendments also explicitly empower lawyers in individual cases, by stipulation, to avoid altogether or to modify the disclosure system to suit their views of the needs of their case.

3. Criticism: The proposed disclosure system is "radical."

Responses:

(a) The reach of the duty to disclose (assuming that duty is not obliterated entirely by stipulation) would be far less than the reach of current discovery rules. All the information covered by the amendments is already fully discoverable under the existing rules; in fact, under the rules already in force, a party who refused to disclose the kind of information covered by the initial disclosure obligation during the discovery process would be sanctioned.

(b) The duty to disclose would reach only "the information then reasonably available" to the party. (Adv. Com. Notes) Because "the rule does not demand an exhaustive investigation at this stage of the case," but is limited to information that is reasonably available and that relates to disputed facts pled with particularity, the specter of unfair imposition of sanctions (monetary or preclusive) for shortfalls in initial disclosures is a figment of someone's excessively fertile imagination.

(c) Under the rules already in force, plaintiffs can demand that defendants provide all this information 45 days after defendants are served with the complaint. That is sooner than under the amendments. Defendants can demand that plaintiffs provide this information 30 days after defendants are served. Obviously, that too is sooner than under the amendments.

(d) The amendments would have no adverse impact on litigants' abilities to fend off attacks under Rules 11, 12, or 56. The amendments would have no effect whatsoever on the standards currently used to resolve motions under any of these rules. Nor would the amendments prematurely cut-off a party's access to discovery it needed to fairly defend against any such motions. For example, if the amendments take effect, all parties will retain the full scope of the rights they now enjoy under Rule 56(f) to conduct discovery in order to oppose motions for summary judgment. Judges will understand that it is not the purpose of the disclosure system to set the stage for disposition of cases by early motion. Since that is not the purpose of the disclosures, and since no party is called upon in its disclosures to produce all the information that could be mustered in support of its position, judges will be quick to detect and rebuff any efforts counsel might make to tactically abuse the results of the disclosure system through premature motions.

(e) The amendments would not shrink the scope of attorney-client privilege or work-product protection one iota. Every document and communication that is currently protected by either of those doctrines would remain so protected, and to the exact same extent. These doctrines do not protect underlying facts and percipient evidence; instead, they protect communications between client and counsel, as well as adversarial analyses and plans, all of which would remain protected. And since the initial disclosures would relate only to (1) facts that are (2) disputed and (3) pled with particularity, it is hard to understand how providing names of witnesses and descriptions of categories of discoverable documents could implicate any legitimate concerns about privileges.

Why is it un-American or radical to ask counsel to provide core information that is already clearly discoverable and that is already routinely discovered in fact? Why is it un-American or radical to ask counsel to discuss their case and to try to fashion a sensible discovery plan?

I note that the District Court for the District of South Carolina, not an obviously "radical" jurisdiction, has for several years imposed a duty of early disclosure through court-mandated interrogatories that in some respects is more demanding than the duty that would be imposed by the amendments.

4. Criticism: The amendments are untimely (no action should be taken until completion of experiments under the CJRA).

Responses:

(a) The experiments under the CJRA run through 1997. Assessing their results will take some time. The process of adopting amendments to the Federal Rules of Civil Procedure takes, realistically, some three years. Thus, Congress would be postponing action on the serious problems in the civil discovery system for ten years if Congress were to block implementation of these amendments on the theory that it is premature to act until the results of CJRA experimentation are fully digested.

(b) As important, there is a very real risk that blocking or "suspending" (a euphemism for the kiss of death) implementation of these amendments would discourage the kind of experimentation that is necessary to fulfill the promise of the CJRA. A close examination of the early implementation plans from many district courts, and the recent history of vacillation about how to respond to the CJRA mandates, expose a serious possibility that many federal courts will not experiment meaningfully with new approaches to reducing cost and delay unless they are pro-actively led and encouraged by Congress and the Judicial Conference.

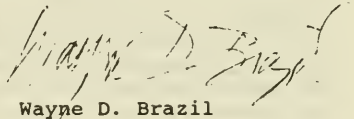
(c) Much of the current experimentation with disclosure is directly attributable to the fact that in 1991 the Civil Rules Committee endorsed the idea of disclosure and began formally moving it toward incorporation in the Federal Rules. But when the Civil Rules Committee was misperceived in early 1992 as retreating from its endorsement of this idea, some courts began to retreat from their tentative commitment to experiment creatively with the disclosure concept and with other substantial measures for attacking cost and delay. Thus, one reason I voted to incorporate the disclosure proposals in the current amendments was a real concern that if we did not demonstrate leadership in this area many district courts would do little significant experimentation under the CJRA.

(d) The amendments as crafted by the Rules Committee are intended to complement and reinforce the CJRA in two important ways: first, by actively encouraging each district court to conduct substantial experiments with new ways to reduce cost and delay, and, second, by

providing all courts with a model approach to disclosure and discovery management that is the refined product of five years of thoughtful debate, reactions to informed criticisms, and multiple reformulations of proposals by a group of experienced judges and lawyers whose sole objective is to improve the administration of justice. The Advisory Committee devoted much more time and research to this matter than could be expected of any local group. The product of its labor, the current disclosure/discovery management proposal, is a sophisticated accommodation of many competing considerations and criticisms. As such, it represents one model that clearly is worthy of serious consideration in the district courts. The proposed amendments to the civil rules compel nothing more. But if Congress blocks implementation of these amendments, that serious consideration by district courts may not be forthcoming. And if it isn't, the purposes of the CJRA may be badly compromised.

Both because the criticisms of the amendments are unpersuasive, and because blocking their implementation could do serious harm to the CJRA, I respectfully offer my hope that Congress will permit the amendments to take effect on December 1st of this year.

Sincerely,

A handwritten signature in dark ink, appearing to read "Wayne D. Brazil", with a stylized flourish at the end.

Wayne D. Brazil

APPENDIX 11.—LETTER FROM WAYNE D. BRAZIL, U.S. MAGISTRATE,
U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFOR-
NIA, TO HON. WILLIAM J. HUGHES, CHAIRMAN, JULY 14, 1993

United States District Court
Northern District of California
150 Golden Gate Avenue — Box 36008
San Francisco, California 94102

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JUL 1 1993

Sub on Courts

(11) 256 2112

JUL 14 1993

Chambers of
Wayne D. Brazil
United States Magistrate

July 14, 1993

The Honorable William J. Hughes
Chairman, Subcommittee on Intellectual Property and
Judicial Administration
House of Representatives, Committee on the Judiciary
2138 Rayburn House Office Building
Washington, D.C. 20515-6216

Re: Additional Thoughts Supportive of Proposed Amendments to
the Federal Rules of Civil Procedure

Dear Chairman Hughes:

Since writing to you on June 11, 1993 about the proposed amendments to Federal Rules of Civil Procedure 26 - 37 I have had an opportunity to review testimony on this subject given before the Subcommittee on Intellectual Property and Judicial Administration in the House of Representatives. That testimony prompts me to share two additional thoughts that I hope are worthy of consideration.

I fear that many of the opponents of the proposed changes do not fully appreciate the balance that the judicial branch has very self-consciously built into these proposals and the fact that they represent an integrated system whose parts are practically and philosophically interdependent. Most significantly, the presumptive limits on discovery activity (e.g., on the number of interrogatories and of depositions) have been justified in no small part on the theory that the disclosures that would be made under amended Rule 26(a)(1) and (2) would reduce the need for some of the discovery that might be necessary if core information about the case was not otherwise available. The disclosures, in other words, were intended to balance the limitations on discovery, leaving the playing field even. I fear that some opponents of the disclosure proposals either have failed to understand the importance of this balance or are attempting to sever and suspend the disclosure portions of the amendments in a self-conscious effort to change the current balance and gain advantages in litigation.

Opponents of the proposed changes also do not seem to appreciate the integrated relationship between the disclosure obligation in Rule 26(a)(1) and the meet and confer/discovery planning conference that is called for in amended Rule 26(f) and that virtually everyone seems to support. Eliminating the disclosure obligation under (a)(1) could seriously compromise the

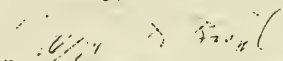
productivity of the meet and confer process under (f). Experience with meet and confer obligations in other settings, e.g., with respect to discovery disputes, shows that some lawyers, unless otherwise constrained, tend to turn meet and confers into hollow rituals. There is a serious risk that the meet and confers called for under Rule 26(f) would very often degenerate into such unproductive rituals if the disclosure obligation were dropped. It is largely the rule-driven need to come to terms with the disclosure obligation that would make the meet and confers truly meaty. Lawyers faced with the requirement to make the disclosures called for in the rules or the need to re-negotiate the terms of the disclosure obligation, and lawyers who see an opportunity to acquire useful information about the case through disclosures made by their opponents, will feel much greater incentives to participate meaningfully in the meet and confer process than lawyers without those obligations and opportunities. In other words, the reality of the requirement of disclosure will make real the meet and confer process.

Moreover, the disclosures and/or the negotiations about reshaping the disclosures to fit the needs of particular cases will provide counsel with a much richer and more specific information base on which to do the discovery planning that is supposed to be the major item on the meet and confer agenda. With disclosure, discovery planning can be much more productive, focused, and reliable than it could be without disclosure. In short, removing disclosure from this system might well eviscerate the meet and confer process.

These examples expose a more general concern, a concern I express in a spirit of fulsome respect for the work done by the committees in the House and Senate who pull the lead oars in matters related to the judiciary. Because the balance and integration of the various parts of the package of amendments to Rules 26 - 37 is so real but in some instances so difficult to perceive, even after careful examination of the proposals, I fear that if Congress attempts to selectively delete or change some parts of the package it will, unintentionally, upset the balance or disrupt the integration that has been designed into the system, leaving it out of balance and causing side-effects whose implications are not fully foreseen. The risk of causing unintended effects is especially great with respect to these rule changes, which are considerable in number and which are the product of literally years of careful consideration by the judges and the lawyers on the relevant committees of the Judicial Conference.

I am most grateful for your consideration of these thoughts.

Sincerely,


Wayne D. Brazil

APPENDIX 12.—LETTER FROM BRIAN BUSEY AND DONNA M. MURASKY, COCHAIRS, COURTS, LAWYERS AND THE ADMINISTRATION OF JUSTICE SECTION, THE DISTRICT OF COLUMBIA BAR (WITH ATTACHMENTS), TO HON. WILLIAM J. HUGHES, CHAIRMAN, JUNE 16, 1993

COURTS, LAWYERS AND THE ADMINISTRATION OF JUSTICE SECTION



The District of Columbia Bar

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Hon. M. Murasky, Co-Chair
Cynthia E. Busey, Secretary
Cynthia A. Busey
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Hon. A. Busey

Cynthia A. Busey
Chair, Courts and Justice Section
Barbara J. Busey
Vice Chair, Courts and Justice Section
Hon. A. Busey, Jr.
Board of Governors Liaison
Cynthia A. Busey
Section Manager

June 16, 1993

BY HAND

Hon. William J. Hughes
Chairman
Subcommittee on Intellectual Property
and Judicial Administration
Committee on the Judiciary
United States House of Representatives
Cannon House Office Building
Washington, D.C. 20515-6219

Dear Chairman Hughes:

The Courts, Lawyers, and the Administration of Justice Section of the District of Columbia Bar respectfully submits these comments opposing the proposed mandatory disclosure amendment to Rule 26(a) of the Federal Rules of Civil Procedure.

INTEREST OF THE SECTION

The District of Columbia Bar is the integrated bar for the District of Columbia. Among the D.C. Bar's sections, the Courts, Lawyers, and the Administration of Justice Section serves as the official clearinghouse for comments on proposed rule changes in the federal and District of Columbia courts. Our Section previously filed comments, dated February 15, 1992 and August 27, 1992, opposing an earlier version of the mandatory disclosure rule and opposing the final version of the new rule which was approved by the Judicial Conference, respectively. Copies of those comments are enclosed for your reference. The views expressed herein represent only those of the Courts, Lawyers, and the Administration of Justice Section and not those of the D.C. Bar or of its Board of Governors.

COMMENTS

While the Section supports many of the proposed rule changes transmitted to the Congress by the Supreme

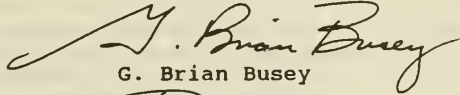
Court, the Section opposes mandatory disclosure during discovery. Mandatory disclosure is intended by its proponents to work a major, positive change in discovery practice. Contrary to its goals, however, we expect this change to cause more problems than it will solve.

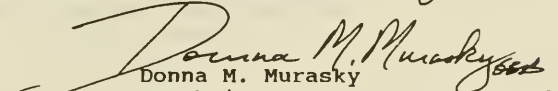
First, mandatory disclosure will in practice often delay and complicate the discovery process and increase the number of discovery disputes that judges must resolve. For example, mandatory disclosure would add an unnecessary round to the discovery process in cases in which the parties would otherwise conduct little or no formal discovery. Although revisions in the formulation of the disclosure standard were steps in the right direction, the meaning of the standard remains ambiguous. This uncertainty increases the likelihood of satellite litigation, especially in light of the severe sanctions that can be imposed for disclosure judged incomplete in hindsight. Mandatory disclosure also has the potential to undermine important values protected by the adversary process including the attorney-client privilege and the work-product doctrine.

Second, at a minimum, adoption of mandatory disclosure on a nationwide basis is premature. One of Congress' goals in the Civil Justice Reform Act was to encourage experimental approaches to discovery so that alternative methods could be evaluated on the basis of actual experience. Almost two dozen federal district courts are now implementing mandatory disclosure on an experimental basis. The experience in these districts should be reviewed before mandatory disclosure is permanently implemented throughout the country. An opportunity for evaluation makes particular sense in light of the near-universal opposition to this rule from the bench and from all segments of the bar.

For these reasons, the Section respectfully requests that the Congress strike the proposed amendment to Rule 26(a)(1) or, at the very least, delay its implementation until experience with this rule in experimental districts can be fully evaluated.

Sincerely yours,


G. Brian Busey


Donna M. Murasky
Co-Chairs, Courts, Lawyers and
the Administration of Justice
Section

Enclosures

cc: Edward O'Connell, Esq.
Carol Ann Cunningham,
D.C. Bar Sections Manager
Carol Elder Bruce
Carol Fortine
Hon. Eric H. Holder, Jr.
David A. Reiser
Donna L. Wulkan
Anthony C. Epstein, Chair, Court Rules
Committee, Courts, Lawyers and
the Administration of Justice

COURTS, LAWYERS AND THE ADMINISTRATION
OF JUSTICE SECTION OF THE DISTRICT OF COLUMBIA BAR

LETTER TO THE JUDICIAL
CONFERENCE OF THE UNITED STATES
ON THE PROPOSED DISCLOSURE
AMENDMENT TO RULE 26(a) OF
THE FEDERAL RULES OF
CIVIL PROCEDURE

Brian Busey, Cochair
Donna M. Murasky, Cochair

Carol Elder Bruce
Carol Fortine
Eric H. Holder, Jr.
David A. Reiser
Donna L. Wulkan

August 27, 1992

Steering Committee of the
Courts, Lawyers and the
Administration of Justice
Section

STANDARD DISCLAIMER AND DISCLOSURE

The views expressed herein represent only those of the Section on Courts, Lawyers and the Administration of Justice of the District of Columbia Bar and not those of the Bar or its Board of Governors.

Summary of Proposed Letter of
the Courts, Lawyers and
The Administration of Justice
Section to the Judicial
Conference of the United States

The Courts, Lawyers and the Administration of Justice Section and the Court Rules Committee, which regularly monitors and comments on proposed changes in federal and local court rules, intends to submit a letter to the Judicial Conference of the United States on the proposed disclosure amendment to Rule 26(a) of the Federal Rules of Civil Procedure.

The letter notes that the Section previously submitted comments to the Committee on Rules of Practice and Procedure of the Judicial Conference on the proposed amendments to the Federal Rules of Civil Procedure, including proposed amendments to Rule 26(a). In those comments, the Section specifically opposed the automatic disclosure feature of the proposed amendments to Rule 26(a).

Following considerable debate, the Advisory Committee on Civil Rules forwarded a revised version of the proposed amendment to Rule 26(a) to the Committee on Rules of Practice and Procedure. That committee has, in turn, forwarded the revised version of the changes to Rule 26(a) to the Judicial Conference for approval, although the revised version has not been reissued for public comment.

The Litigation Section of the District of Columbia Bar intends to submit a statement shortly to the Judicial Conference requesting that the proposed disclosure amendment to Rule 26(a) be returned to the Committee on Rules of Practice and Procedure for further public comment and, thereafter, reconsideration. The Section on Courts, Lawyers and the Administration of Justice joins this request and endorses the Litigation Section's statement.

The Section believes that the new revised version of the disclosure amendment to Rule 26(a), while an improvement on the earlier proposed version, would result in a substantial change from current discovery practice. The revised version of the disclosure amendment simply does not address all of the significant concerns expressed in the Section's comments on the earlier version of that proposal. In view of the fundamental and far-reaching changes that would be effected by the proposed amendment, the Section believes that republication and reconsideration are warranted.

COURTS, LAWYERS AND THE ADMINISTRATION OF JUSTICE SECTION



The District of Columbia Bar

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FREDERICK D. COBLE, JR.

Board of Governors Liaison

CAROL ANN CUMMINGS

Sections Manager

August 27, 1992

COMMITTEES

Court Rules

Legislation

The Chief Justice of the United States
 William H. Rehnquist
 Chairman, Judicial Conference of
 the United States
 811 Vermont Avenue, N.W.
 Suite 713
 Washington, DC 20544

Dear Mr. Chief Justice:

This letter is submitted on behalf of the Section on Courts, Lawyers and the Administration of Justice of the District of Columbia Bar and that Section's Committee on Court Rules.^{1/}

In February 1992, this Section submitted comments to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States on the proposed amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence. Among those comments were comments on the proposed amendments to Rule 26(a) of the Federal Rules of Civil Procedure, as published for public comment by the Advisory

^{1/} The views expressed herein represent only those of the Section on Courts, Lawyers and the Administration of Justice of the District of Columbia Bar and not those of the Bar or its Board of Governors.

Committee on Civil Rules in August 1991. The Section opposed the automatic disclosure feature of the proposed rule.

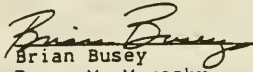
The Advisory Committee on Civil Rules has now forwarded a new proposed amendment to Rule 26(a) to the Committee on Rules of Practice and Procedure. We understand that that Committee has, in turn, forwarded the new proposal to the Judicial Conference for approval. The new proposed rule has not been reissued for public comment.

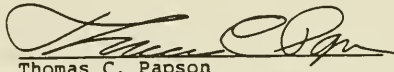
The Litigation Section of the District of Columbia Bar has adopted and is submitting a statement to the Judicial Conference of the United States requesting the Conference to return the proposed disclosure amendment to Rule 26(a) to the Committee on Rules of Practice and Procedure for reconsideration following an opportunity for public comment. The Section on Courts, Lawyers and the Administration of Justice of the District of Columbia Bar joins the request of the Litigation Section and endorses its statement in support of republication and reconsideration.

In addition, the Section on Courts, Lawyers and the Administration of Justice believes that the new version of the automatic disclosure proposal itself would effect a substantial change from current discovery practice and continues to raise significant issues worthy of public comment. Although the Section believes that the revision does represent an improvement over the original proposal, it does not, in our view, adequately address all of the concerns identified in our prior comments and in the comments of other members of the legal community.

We look forward to an opportunity to provide detailed comments on the proposed amendments to Rule 26(a) to the Committee on Rules of Practice and Procedure in the event that the new proposal is republished for public comment.

Respectfully submitted,


 Brian Busey
 Donna M. Murasky *by DE*
 Cochairs, Section on Courts,
 Lawyers and the Administration
 of Justice


 Thomas C. Papson
 Richard B. Nettler
 Cochairs, Committee on Court Rules

cc: The Honorable Robert E. Keeton (Boston Chambers)
 Professor Thomas E. Baker
 The Honorable William O. Bertelsman
 The Honorable Frank H. Easterbrook
 The Honorable T.S. Ellis, III
 Alan W. Perry, Esquire
 The Honorable Edwin J. Peterson
 The Honorable George C. Pratt
 The Honorable Dolores K. Sloviter
 The Honorable Alicemarie H. Stotler
 The Honorable George J. Terwilliger, III
 William R. Wilson, Esquire
 Professor Charles Alan Wright
 Dean Daniel Coquillette
 Joseph F. Spaniol, Jr., Esquire

SECTION ON COURTS, LAWYERS AND THE ADMINISTRATION OF JUSTICE
OF THE DISTRICT OF COLUMBIA BAR

COMMENTS ON PROPOSED AMENDMENTS
TO THE FEDERAL RULES OF CIVIL PROCEDURE
AND THE FEDERAL RULES OF EVIDENCE

Carol Elder Bruce, Cochair
Randell Hunt Norton, Cochair
Hon. Eric H. Holder, Jr.
Jeffrey F. Liss
Donna M. Murasky
David A. Reiser

Richard B. Nettler, Cochair
Thomas C. Papson, Cochair*
Joel Bennett
Brian Busey
Anthony C. Epstein*
James R. Klimaski*
Michael K. Madden*
Michael E. Zielinski*

Steering Committee
Courts, Lawyers and the
Administration of
Justice Section of the
District of Columbia Bar

Committee on Court Rules

February 15, 1992

*/ Principal authors

STANDARD DISCLAIMER

The views expressed herein represent only those of the Section on Courts, Lawyers and the Administration of Justice of the District of Columbia Bar and not those of the Bar or its Board of Governors.

BRIEF SUMMARY OF COMMENTS BY THE
SECTION ON COURTS, LAWYERS, AND THE ADMINISTRATION
OF JUSTICE ON PROPOSED AMENDMENTS TO THE FEDERAL RULES
OF CIVIL PROCEDURE AND THE FEDERAL RULES OF EVIDENCE

The Section on Courts, Lawyers, and the Administration of Justice and its Committee on Court Rules has commented on the preliminary draft of amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence proposed by the Judicial Conference Advisory Committee on Civil Rules. While generally supporting the proposed changes, the Section raises questions about (1) the practical effects of the proposed changes to Rule 11 (particularly the provision permitting a "safe harbor" for improper filings if they are withdrawn in a timely fashion); (2) the automatic disclosure discovery provisions with respect to "core information" and (3) the practical effects of the changes with respect to discovery relating to experts and the trial testimony of experts.

COMMENTS OF THE SECTION ON COURTS, LAWYERS,
AND THE ADMINISTRATION OF JUSTICE
OF THE DISTRICT OF COLUMBIA BAR ON
PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE
AND THE FEDERAL RULES OF EVIDENCE

The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States has solicited comments on a preliminary draft of amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence proposed by the Judicial Conference Advisory Committee on Civil Rules. The Section on Courts, Lawyers, and the Administration of Justice of the District of Columbia Bar, and its Committee on Court Rules, submit these comments concerning certain of these proposals.

The District of Columbia's Bar is the integrated bar for the District of Columbia. Among the Bar's sections is the Section on Courts, Lawyers, and the Administration of Justice. The Section has a standing Committee on Court Rules, whose responsibilities include serving as a clearinghouse for comments on proposed changes to court rules. Comments submitted by the Section represent only its views, and not those of the D.C. Bar or of its Board of Governors.

The proposed amendments to the Federal Rules fall into four basic categories. The first category consists of changes to Rule 11 of the Federal Rules of Civil Procedure. Although we do not take a position concerning the basic substance of the proposed Rule, we do suggest ways in which the proposal could be improved -- particularly with respect to the "safe harbor" provision -- if its general approach is adopted.

The second category of proposed amendments deals with changes to the discovery process. The most significant of these changes would restructure the discovery process by requiring automatic disclosure of certain information and postponement of additional discovery until that disclosure is complete. We believe that the automatic disclosure procedure would delay and complicate the discovery process. We support other proposed changes, for example, imposing limitations on depositions and interrogatories. We also suggest modifications of some other aspects of the proposed discovery changes.

Third, we generally support the proposed amendments to Rule 56, which would make the Rule consistent with actual practice and with developments in the case law. We comment on two relatively minor aspects of the proposed rule for summary adjudication, involving the mechanism for identifying facts not genuinely in dispute and the possibility of hearings with oral testimony.

Finally, we generally endorse the proposed changes dealing with expert witnesses as a reasonable measure to reduce the unnecessary use of experts and the cost of litigation. We do, however, question whether expert depositions should be admissible regardless of the availability of the expert.

Our specific comments follow.

RULE 11

Perhaps no provision in the Federal Rules of Civil Procedure has engendered as much recent controversy among judges and lawyers as has Rule 11. We do not take a position in the ongoing debate about whether Rule 11 goes too far or not far enough in making sanctions available. The proposed amendment appears intended to make relatively modest changes in the Rule. We identify concerns and suggest modifications about the way the proposed Rule implements its approach.

In our view, the most significant change in Rule 11 would be to create a "safe harbor" for even the most egregious Rule 11 violation -- to give parties or counsel absolute protection against sanctions if they withdraw a filing after receiving reasonable notice of opposing parties' contention that the filing violates Rule 11. We have no objection to a requirement that, before seeking Rule 11 sanctions, a party provide notice through a simple statement describing the objections to the challenged filing, so that the other party has an opportunity to withdraw the filing. Such a requirement would be consistent with current practice and with some local rules.

However, the type and method of notice required under the proposed amendment is unclear and perhaps unduly burdensome. Rule 11(c)(1)(A) appears to require service of a party's motion or the Court's order to show cause as the mechanism for providing notice. Any requirement that the alleged victim of a Rule 11 violation prepare a formal

motion, accompanied perhaps by a detailed memorandum of law and supporting evidence, could operate as a substantial deterrent to pursuit of significant Rule 11 violations if the alleged violator could completely avoid sanctions by withdrawing a filing after forcing the alleged victim to incur that burden and expense.

The proposed Rule is ambiguous as to whether the party receiving a show cause order under subsection (c)(1)(B) may withdraw or correct the offending filing and thereby avoid sanctions, as the party may under subsection (c)(1)(A). We see no reason for such a distinction, and the safe harbor should be as broad for challenges initiated by the court as for those initiated by parties.

The proposed revision is also ambiguous about when the movant notifies the Court of a Rule 11 challenge. Subparagraph (c)(1)(A) provides that a sanctions motion is to be served upon the party that filed the challenged paper 21 days before it is filed with the Court. But the parenthetical phrase of this subparagraph also indicates that some notice apparently should be given to the Court before 21 days have elapsed, at least if the Court is asked to prescribe "such other time" for withdrawal or correction. In addition, the Rule should make clear that the time for response begins to run 21 days after service, not from the day of service as some local rules provide. E.g., Local Rule 108(b) (D.D.C.). The motion procedure should be described more specifically if this proposed change is ultimately adopted.

Finally, the proposed revision apparently requires parties to amend their filings each time new facts are discovered that make it improper to maintain any contention that was reasonable when initially made. Although the "safe harbor" provision in subsection (c) tends to mitigate the practical impact of this requirement, it could subject both courts and counsel to the burden of frequent motions to amend the pleadings, even with respect to relatively insignificant facts. If this is the intended effect, it should be clarified.

DISCOVERY

Automatic Disclosures

The Section believes that the automatic disclosure procedure, particularly with respect to witnesses and documents, would accomplish little in most cases except to delay the completion of discovery. Given the relatively limited scope of the initial disclosures, and the concern that opposing parties would interpret them more narrowly than appropriate, each party could be expected to serve subsequent interrogatories and document requests as broad as those now in use. However, under the proposal, such discovery requests could not be served, and no responses would be obtained, until some time after the initial automatic disclosure. Thus, the automatic disclosure procedure would probably not achieve its intended result of simplifying and expediting the discovery process, but would rather cause delay and complica-

tion. An alternative, simpler way to ensure that discovery begins promptly would be to require initial discovery requests to be served within a specified time after issue is joined.

Compounding our concerns about the automatic disclosure requirement is the likely uncertainty about the scope of the required initial disclosures: how does a party decide whether a person or category of document "bears significantly on any claim or defense"? Particularly at the early pleading stage, and in more complicated cases, a party cannot always anticipate the theories underlying another party's claims or defenses. The Committee Note states that "counsel are expected to disclose the identity of those persons who, if their potential testimony were known, might reasonably be expected to be deposed or called as a witness by any of the parties." Yet, opposing counsel may often legitimately differ about who might be expected to be deposed or called as a witness.

Because of the possibility of severe sanctions resulting from an incomplete disclosure, the risks resulting from uncertainty about the scope of disclosure are serious. While the same kinds of risks currently exist to a certain extent with respect to case-specific discovery requests, a responding party can protect itself by objecting to vague and ambiguous requests. Moreover, the opportunity for mandatory preclusion under proposed Rule 37(c)(1) might result in more discovery motions by encouraging parties regularly to chal-

lenge the completeness of disclosures. At the very least, adoption of the proposal would lead to several years of costly litigation about the scope of the initial disclosure obligation in districts around the county.

For these reasons, we do not support the proposed requirement for initial automatic disclosure. If, however, that provision is retained, we recommend that proposed Rule 37(c)(1) be modified so that the preclusion sanction is more discretionary. The proposed Rule mandates preclusion for any failure to disclosure that lacks substantial justification and is not harmless. Even if the failure does not satisfy those tests, preclusion may be too drastic a sanction -- for example, a negligent failure to disclose evidence critical to a party's case until after the close of discovery but significantly in advance of trial. This modest change would be consistent with the proposed amendment to Rule 11 emphasizing the need for flexibility in the selection of sanctions.

Pretrial Disclosures

The Section agrees in concept with subdivision (a)(3), which requires disclosure 30 days before trial of witnesses, exhibits, and certain other information. These disclosure requirements are already imposed in most cases by local rule or pretrial order.

The Section, however, questions the feasibility and usefulness of distinguishing between witnesses and exhibits that a party "expects" to present and those it "may" present.

The proposed Committee Note states that the latter are those witnesses or exhibits that "will be presented only if needed because of unanticipated developments during trial." It is likely to be difficult to identify witnesses and exhibits that may be necessitated by "unanticipated" developments. Moreover, as a practical matter, most counsel, out of caution, may list witnesses and exhibits as "expected," thus minimizing the benefit from separating "expected" from "possible" witnesses and exhibits.

Finally, the proposed rule provides that the filing deadlines in the rule would be superseded if a different time is specified by the court. The rule or the comment should make clear that the court can establish different deadlines either by order in a particular case or by local rule. For example, Rule 209 of the Rules of the U.S. District Court for the District of Columbia requires that trial witnesses and exhibits (in addition to other information) be listed in a pretrial statement to be filed not less than eleven days before the final pretrial conference.

Informal Resolution of Discovery Disputes

Proposed Rules 26(c), 37(a)(2), and 37(d) would require that motions for a protective order, to compel, or for sanctions be accompanied by a certification that the movant in good faith has conferred or attempted to confer with the opposing party to attempt to resolve the matter without court action. We support such a requirement, which

is not uncommon under local rules in federal courts and in state court rules.

Depositions

We support the proposed presumptive limit in Rule 30 on the number (10 per side) and length (6 hours) of depositions. We suggest that the Rule or the comments clarify how the limit would apply to defendants filing cross-claims or third-party claims. Would a defendant filing a cross-claim or third-party complaint be limited to the ten depositions permitted to defendants, or would it be permitted an additional ten depositions in its capacity as cross-claimant or third-party plaintiff? In many cases the issues raised by a cross-claim are tied closely enough to the issues raised by the underlying complaint that a cross-claimant would not need an additional ten depositions. However, because this might not be the case with a third-party complaint, consideration should be given to providing in the Rule for additional depositions for third-party plaintiffs, especially since third-party defendants are permitted ten depositions.

Interrogatories

We support a limit in Rule 33 on the number of interrogatories, but recommend that the limit be increased to 30 or 40 interrogatories. A limit of 15 interrogatories is too low, particularly in light of the ambiguity of what

constitutes a "subpart." For comparative purposes, we note that the District of Columbia Superior Court Civil Rules permit 40 interrogatories, and that the Local Rules of the U.S. District Courts for the District of Maryland and for the Eastern District of Virginia each permit 30 interrogatories.

SUMMARY ADJUDICATION

Although the proposed amendments would substantially revise the language of Rule 56, most of the revisions would simply make that language consistent with actual practice and with developments in the case law. The Section generally endorses these revisions. We offer comments on two aspects of the proposal.

First, subsection (c) of the revised rule would require that the motion for summary adjudication "recite, in separately numbered paragraphs, the specific facts asserted to be not genuinely in dispute." This is very similar to the requirement found in many local rules that has become a fairly standard part of summary judgment practice. Under most local rules, however, the statement of facts as to which there is no genuine dispute is ordinarily a filing separate from the motion itself. See, e.g., Local Rule 108(h) (D.D.C.) (motions for summary judgment to "be accompanied by a statement of material facts as to which the moving party contends there is no genuine issue"). Such statements are often quite lengthy. Further, in many districts, either by rule or practice, legal memoranda or points and authorities

in support of a motion are placed in a document separate from the written motion, and the motion itself is relatively cursory.

We see no reason why the Federal Rule should mandate that the factual recitation be part of the motion, thereby requiring a departure from established practice in many districts. Accordingly, we recommend that the rule be amended to provide that the recitation of specific facts asserted to be not genuinely in dispute may be submitted either in the motion, the supporting memorandum, or in a separate statement of facts.

Second, subsection (g) of the revised rule is a new provision entitled "Conduct of Proceedings." It provides, in part, that the court "may conduct a hearing to . . . receive oral testimony to clarify whether an asserted fact is genuinely in dispute." The Committee Note states that the purpose of such testimony would be "to clarify ambiguities in the submitted materials -- for example, to clarify inconsistencies within a person's deposition or between an affidavit and the affiant's deposition testimony." According to the Note, the evidentiary hearing would be held "not to allow credibility choices between conflicting evidence but simply to determine just what the person's testimony is." The Note states that the new authority under subsection (g) would not "supplant" the existing authority under Rule 42(b) to hold hearings on issues that involve credibility and weight of evidence.

We are concerned that the revised rule does not sufficiently constrain the court's limited authority in the summary adjudication context. In contrast to Rule 42(b) hearings, it will be very difficult in the Rule 56 context for a court to draw the fine line between making credibility choices and merely deciding "just what the person's testimony is" in an oral hearing under new Rule 56(g). We therefore suggest that the fourth clause in proposed Rule 56(g) be deleted.

EXPERT WITNESSES

We generally support the proposed changes dealing with testimony by expert witnesses in Rules 16 and 32 of the Federal Rules of Civil Procedure and Rules 702 and 705 of the Federal Rules of Evidence. A principal purpose of the proposed changes in the Federal Rules of Evidence is to limit the unnecessary or unduly expensive use of experts. We believe that this proposal represents a reasonable attempt to achieve the goals of restraining the expanding use of expert witnesses and securing the just, speedy and less costly resolution of litigation.

The requirement in proposed Rule 26(a)(2) that experts provide a detailed report about their expected testimony, if enforced by the courts, should result in some reduction to the need to take depositions of expert witnesses. The practical benefit of this approach is enhanced by the provision in proposed Rule 26(a)(2)(C) expressly autho-

rizing courts, by local rule or orders in particular case, to alter the type or form of disclosure. However, the rule should specify whether or not drafts of these required reports are discoverable. There are substantial arguments for and against discoverability, and the issue should be addressed in the rule, rather than left for case-by-case adjudication.

We suggest the following modification of proposed Rule 32(a)(3)(D), which would permit the use of the deposition of an expert witness without having to establish the expert's unavailability. Use of such depositions at trial regardless of the expert's availability is appropriate provided that two conditions are satisfied. First, the party that intends to use the deposition at trial should provide notice before the deposition of that intent. Second, any party against which the deposition would be used should have an opportunity, within the time provided by rule or by order, to take a discovery deposition before the deposition that is expected to be used at trial.

These conditions are necessary because the relaxation of admissibility of expert depositions would tend to require every expert deposition to be conducted as a de bene esse deposition. With witness unavailability eliminated as a requirement for admissibility, a party that deposes the opposing expert would be exposed to use of the deposition at trial at the sole discretion of the opposing party. The party whose expert witness has been deposed -- at the oppo-

nent's expense -- might be willing to avoid the expense and uncertainty of producing the witness at trial by using the deposition. As a practical matter, de bene esse depositions are substantially different from discovery depositions. The two conditions that we suggest in the preceding paragraph would achieve two purposes: they would give the parties fair notice that the deposition should be conducted as a de bene esse deposition; and they would permit the opportunity for discovery of the expert before taking the deposition in a manner suitable for use at trial.

APPENDIX 13.—LETTER FROM HON. BUTLER DERRICK, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF SOUTH CAROLINA, MAY 12, 1993, TRANSMITTING A LETTER FROM ASHLEY B. ABEL, ESQ., SPARTANBURG, SC, MAY 3, 1993, TO HON. WILLIAM J. HUGHES, CHAIRMAN

BUTLER DERRICK

39 DISTRICT SOUTH CAROLINA
LYNNE J. RICHARDSON
ADMINISTRATIVE ASSISTANT

221 CANNON HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-4003
(202) 225-5301

CHIEF DEPUTY MAJORITY WHIP

COMMITTEES

RULES

CHAIRMAN SUBCOMMITTEE ON
THE LEGISLATIVE PROCESS
SELECT COMMITTEE ON AGING
DEMOCRATIC STEERING AND
POLICY COMMITTEE

Congress of the United States
House of Representatives
Washington, DC 20515-4003

May 12, 1993

Post Office Box 8128
ANDERSON, SC 29622
803 248-7401

BARBARA GAINES
DISTRICT MANAGER

5 FEDERAL BUILDING
211 YORK STREET, NE
ALBANY, SC 29801
803 848-5571

128 FEDERAL BUILDING
120 MAIN STREET
GREENWOOD, SC 29240
803 223-8251

1-800-282-8059

The Honorable William J. Hughes, Chairman
Subcommittee on Intellectual Property and
Judicial Administration
207 Cannon House Office Building
Washington, D.C. 20515

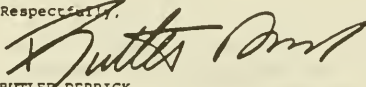
Dear Mr. Chairman:

Enclosed for your review is a copy of a letter I have received from Ashley Abel, an attorney from Spartanburg, South Carolina. Mr. Abel objects to the amendments to the Federal Rules of Civil Procedure as proposed by the Supreme Court. I ask that Mr. Abel's comments be made a part of your subcommittee's review process of this recommendation.

Thank you for your attention to this matter.

With kindest regards, I am

Respectfully,


BUTLER DERRICK
Member of Congress

D/w1

Enclosure

EDWARDS, BALLARD, BISHOP, STURM, CLARK AND KEIM, P. A.

ATTORNEYS AT LAW

TELEPHONE
803/542-5610
FACSIMILE
803/542-5712

NATIONS PLAZA, SUITE 400
101 NORTH PINE STREET
P. O. BOX 5398
SPARTANBURG, SOUTH CAROLINA 29304

IN NORTH CAROLINA
EDWARDS, BALLARD
CLARK AND BARRETT
(919) 750-0717

May 3, 1993

Representative Butler Derrick
United States House of Representatives
Washington, DC 20515

Re: Proposed Changes to the Federal Rules of Civil Procedure

Dear Representative Derrick:

Butler
It is my understanding that on April 22, 1993, the U.S. Supreme Court forwarded to Congress a package of amendments to the Federal Rules of Civil Procedure. These amendments will take effect on December 1, 1993, unless Congress takes action by November 1, 1993. I am writing to express my strong opposition to some of these amendments and to ask for your help in deleting them.

First, these amendments substantially change Federal Rule of Civil Procedure No. 11. Rule 11 is the rule of civil procedure that provides federal judges the authority to sanction attorneys and/or parties who abuse the processes of the court by filing frivolous claims or defenses, by making arguments that are clearly not warranted by existing law or other facts, or who use the litigation process to harass or cause unnecessary delay or cost to other parties. The proposed amendment to Rule 11 would take much of the teeth out of the rule by limiting the situations to which the rule applies, by allowing abusers 21 days to withdraw any offending pleading and avoid possibility of sanctions, and by encouraging the use of nonmonetary sanctions or penalties paid to the court rather than to the prevailing party as compensation for the wrongdoer's acts. Most tellingly, a Federal Judicial Center survey showed that 80% of judges believe that the current Rule 11 should be retained and that the amendment should not be passed. I strongly urge you to see that this does not happen.

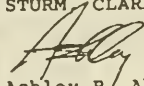
Second, the proposed amendments to the discovery process would provide for the mandatory exchange of so-called "core information" between parties in every case. Since this amendment would only add another layer of discovery to the already abundant discovery devices contained in the rules, it would do nothing to shorten or decrease the expense of litigation and do much to add a further element of cost and delay to every proceeding. Therefore, I strongly oppose these amendments as well.

Please let me know your thoughts on this issue as soon as possible. I trust that you will agree that these amendments are not in the best interest of the judicial processes of our nation and that you will fight to prevent them from being enacted.

I remain,

Very truly yours,

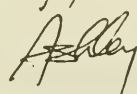
EDWARDS, BALLARD, BISHOP,
STURM, CLARK AND KEIM, P.A.



Ashley B. Abel

ABA:mrn

P.S. Butler,
I hope all is well with you.
Congratulations on your leadership
position in the House! As you can
see from the above address, my
wife and I (and our 5-month-old
son Ash) have moved to Spartanburg.
Let me know if you head this
way - I would like to see
you.

Very truly,


APPENDIX 14.—LETTER FROM HON. WILLIAM J. HUGHES, CHAIRMAN, TO HON. BUTLER DERRICK, JUNE 2, 1993

44 1 10 77 10 10 10 10
JACK BROOKS TEXAS CHAIRMAN
DON EDWARDS CALIFORNIA
JOHN C. DENTON JR. MICHIGAN
ROBERT L. MATHIAS KENTUCKY
WILLIAM J. HUGHES NEW JERSEY
BRIAN L. LARSEN OREGON
PATRICK SCHNEIDER COLORADO
BAR BUCKMAN IOWA
BARRY FRANK MASSACHUSETTS
CHARLES E. SCHUMER NEW YORK
HOWARD L. BASSMAN CALIFORNIA
BOB SCHUMER VIRGINIA
JOHN BRYANT TEXAS
GEORGE E. BARNES TEXAS
DAVID A. WASHINGTON TEXAS
JACK REED RHODE ISLAND
JEROME R. HADLER NEW YORK
ROBERT C. BOOTH VIRGINIA
DAVID HARRIS OHIO
BILLY L. RAY NORTH CAROLINA
KAYE MCCLELLAN CALIFORNIA

ONE HUNDRED THIRD CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

2138 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6218

44 1 10 77 10 10 10 10
HAMILTON FISH JR. NEW YORK
CAROL J. MOOREHEAD CALIF. PHIL.
HEART J. HYDE ILLINOIS
J. JAMES S. SENESE ARIZONA
BILL BRIDGES ARIZONA
GEORGE W. CULAS PENNSYLVANIA
HOWARD COBLE NORTH CAROLINA
LARRY S. SMITH TEXAS
STEVEN SCHIFF NEW MEXICO
JIM AMSTAD MISSISSIPPI
BETTOR GALLAGHER CALIFORNIA
CHARLES F. CANADY FLORIDA
BOB RUBLE SOUTH CAROLINA
BOB GOODLATT VIRGINIA

MAJORITY—218-3661

MINORITY—218-6808

June 2, 1993

The Honorable Butler Derrick
U. S. House of Representatives
221 Cannon House Office Building
Washington, D.C. 20515


Dear Butler:

I want to thank you for forwarding to me Mr. Ashley Abel's comments on the proposed changes to the Federal Rules of Civil Procedure.

The Subcommittee on Intellectual Property and Judicial Administration will hold an oversight hearing on this subject on June 16, 1993, and I will enter Mr. Abel's remarks as part of the record of that hearing.

Again, thank you for your interest in this important matter.

Sincerely,


William J. Hughes
Chairman
Subcommittee on Intellectual Property
and Judicial Administration

WJH:eov

APPENDIX 15.—LETTER FROM SAM C. POINTER, JR., CHAIRMAN, ADVISORY COMMITTEE ON CIVIL RULES, JUDICIAL CONFERENCE OF THE UNITED STATES, TO HON. WILLIAM J. HUGHES, CHAIRMAN, JUNE 25, 1993

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

ROBERT E. KEETON
CHAIRMAN

PETER G. McCABE
SECRETARY

The Honorable William J. Hughes, Chairman
Subcommittee on Intellectual Property
and Judicial Administration
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

June 25, 1993 June 25, 1993

RECEIVED

JUN 29 1993

Sub on Courts

CHAIRMEN OF ADVISORY COMMITTEES

KENNETH F. RIPPLE
APPELLATE RULES

EDWARD LEAVY
BANKRUPTCY RULES

SAM C. POINTER, JR.
CIVIL RULES

WILLIAM TERRELL HODGES
CRIMINAL RULES

RALPH K. WINTER, JR.
EVIDENCE RULES

Dear Mr. Chairman:

Thank you for the opportunity to appear before the Subcommittee on June 16, 1993, and discuss the new amendments to the Federal Rules of Civil Procedure. I particularly appreciated the obvious preparation by Subcommittee members and the thoughtful questions that focussed attention on some of the issues of most concern to you and the other members of the Subcommittee.

Enclosed is a revision of my prepared remarks, which I ask be substituted in the record for the draft initially submitted. The revision merely corrects certain grammatical and typographical errors.

Before responding to certain additional questions from the Subcommittee received after completion of the hearing, I would like to make a few general observations.

The Subcommittee heard, in abbreviated fashion, the same types of comments which were presented, in far greater detail, to the Advisory Committee over a period of many months. That a majority of comments criticized some portion of the amended rules is, of course, neither surprising nor unusual. Members of Congress are well aware of the phenomenon that, when needed reforms are transformed into specific proposals — which often must balance competing interests and values — groups with special interests will attempt to isolate and criticize certain portions of the proposals with which they are displeased. Nor is it significant that most of the oral presentations to the Advisory Committee were critical of some portion of the amendments; indeed, this was a deliberate choice by the Advisory Committee, which in its hearings was not attempting to "build a record" but rather to better understand and evaluate the objections to the proposed amendments.

Most of the criticisms heard by the Subcommittee were ones that, from the matters previously presented to the Advisory Committee, I was able to anticipate and address. As earlier indicated, some of these criticisms are not frivolous and, indeed, were taken seriously by the Advisory Committee and Standing Committee in developing the rules ultimately

adopted by the Supreme Court. It should be emphasized, however, that many attorneys and litigants, typically on the defense side of litigation, basically are concerned that the disclosure rules will work . . . and on occasion to their disadvantage. One of the speakers before the Subcommittee candidly acknowledged that his basic objection to disclosure was not that it would require disclosure of information not subject to discovery, generate disputes, or increase costs, but rather that in some cases, because of the way a discovery request is phrased by an adversary, he has been able under the prior rules to avoid — or at least delay — disclosing information needed by an adversary to prepare for trial or oppose a summary judgment motion. This concern is not with frivolous litigation, but with the loss of a procedural device that, like common law pleading, can sometimes be used to defeat potentially meritorious litigation. The speaker's candor was commendable, and indeed was frequently acknowledged by many who wrote or spoke to us during the rule-making process. The Advisory Committee, however, believes that this approach is inconsistent with the aims of Rule 1 ("the just, speedy, and inexpensive determination of every action") and is not required by our adversary system.

- Q4. Should the Advisory Committee have included in its comments an indication that the disclosure rules are not intended for cases like Social Security reviews, bankruptcy appeals, and similar cases decided on written record?**

Yes, and in fact this guidance is given in the Committee's Note to Rule 26(a)(1) and to Rule 26(f), found at pp. 226 and 241 of House Document 103-74.

Additionally, at a meeting of Chief District Judges for all of the districts, held in Washington April 29-30, 1993, I discussed this matter — along with others relating to options under the new rules — and highlighted the fact that each court should, before December 1, 1993, decide which cases to exempt from the disclosure requirements.

I plan to provide in writing to each district court, well in advance of the December 1st date, additional suggestions concerning their options under the new rules. The development of these suggestions is, however, complicated at the present time by the possibility of legislation that might affect the type of action the courts would need to take in order to make their choices under the amended rules and the CJRA.

- Q5. Do you expect that at some time in the future the disclosure process, with its emphasis on local options, will be re-examined and a true national federal rule would be adopted?**

Yes. The inclusion of broad options for local variations should be viewed as essentially an interim measure, needed to complement the mandates of the CJRA for local experimentation and variants. When that period is concluded, I would expect modifications in the federal rules to be developed through the rule-making process which would reestablish more uniform national procedures. These would be based upon an analysis of

the experiences — successful and unsuccessful — of courts under their local expense and delay reduction plans.

This approach is in accord with the CJRA. Section 105(c) of Pub. L. 101-650 calls for the Judicial Conference to complete by December 31, 1995, a study of the experiences of 20 districts, and then, based on that study, to "initiate proceedings for the prescription of rules implementing its recommendation, pursuant to chapter 131 of title 28."

Q12. What, in your experience, is the most common cause of discovery abuse?

I believe that the central problem is the excessive number and length of depositions. Too frequently, counsel act as if every possible witness must be formally deposed and as if every possible question should be asked during the deposition. The amended rules should go a long way in remedying this abuse.

A close second is excessive and inefficient document production. The amended rules take a few small steps that may help to correct this problem. However, I confess that we have been unable to find a good answer for this problem, and will be looking closely at local plans to see if any of them develop better solutions that might be incorporated into national rules.

Q15. Are Rule 11 questions now generally court-initiated or adversary-initiated?

The great majority of Rule 11 questions have been initiated as a result of a party's motion, rather than sua sponte action by the court.

The 1990 FJC study looked at Rule 11 activity in 5 district courts covering periods of 22 to 39 months. For the periods covered, the total number of Rule 11 motions or sua sponte orders in the five courts was 1,264, with only 67 — or 5% — of these being sua sponte orders.

The FJC survey of federal district judges conducted in November 1990 reflected that 69.2% of the 549 responding judges indicated they could not remember issuing any sua sponte order under Rule 11 in the preceding 12 months. It might be noted, however, that over two-thirds of them indicated that they, in the preceding 12 months, advised counsel that a particular filing might lead to Rule 11 sanctions.

Q.17 What would be the problem in deferring the disclosure procedure for one year to study the impact of disclosure of the 20 courts subject to the special study?

I addressed this question briefly at the hearing, but some additional comments might be helpful.

It is very important that the new Rules — with their broad authorization for local

variation — take effect on December 1, 1993, which is the same date that all 94 districts must have adopted their local CJRA plans. It is also important that further changes in the national rules regarding disclosure not be considered until after completion of the study of the 20 courts due by December 31, 1995. After that date, consideration of further changes will be appropriate — indeed, is mandated under the CJRA (see question 5). Proposals at that time for further amendments should be handled through the regular rule-making process, which enables the appropriate committees of the Judicial Conference to draft and publish proposed changes and then provides substantial time for suggestions, criticisms, etc. to be made by the bench, bar, and public to these committees. Proposed changes would then be subject to scrutiny by the Judicial Conference, sent to the Supreme Court, and if adopted transmitted to Congress with the 7-month delay period before they became effective. Our best estimate is that new rules, following the schedule directed under the CJRA, could not become effective until December 1, 1998. It would be a major mistake to short-cut this process and attempt to explore these difficult questions directly with Congressional committees, without the extensive prior deliberation provided by the rule-making process. This is particularly true because the Judicial Conference has a statutory mandate to consider initiation of possible rules changes after December 31, 1995.

It was for these reasons that, at the hearing, I indicated that legislation deferring or suspending the effective date of the disclosure requirements — whether for one year or, as the ABA suggests, for 2 years — would, in my opinion, be the worst course of action. If Congress is unwilling for some of the rules to take effect on December 1, 1993, as scheduled, it would be far preferable, in my opinion, for those rules to be rejected at this time, rather than suspended or deferred for later consideration and possible modification by Congress outside the rule-making process. In making this comment, I am assuming, of course, that any such rejection would be accompanied by appropriate statutory language or legislative history making clear that this action would not impair the authority of districts to adopt such procedures under their local CJRA plans or preclude possible amendments relating to such subjects if adopted under the rule-making process after the experimentation period.

Minority Question: Is the amendment to Rule 30(b)(4) prompted by complaints regarding the cost or delay involved with stenographic depositions?

No. While some may argue that video-taped depositions are less expensive than stenographically-recorded depositions, this is a matter that depends upon a number of factors, such as the availability of reporting services, the place where depositions will be conducted, and the likelihood that, after a deposition is taken, a written transcript will be needed. Nor did the Advisory Committee receive any significant criticism of the time taken by court reporters in providing transcripts.

The purpose of the amendments is to provide in the rules some safeguards to protect the fairness and integrity of the record when a deposition is recorded by other than stenographic means (rather than having to deal with these matters on an ad hoc basis); to

assure that a written transcript will be provided to the court and other litigants when a video-taped deposition is used at trial; and to eliminate the need for judicial involvement regarding the method of recording a deposition except when some special problem arises that merits a Rule 26(c) motion.

Without intending any criticism of the services provided by court reporters in recording depositions, I would like to comment briefly on one point presented orally at the hearing by one of the other speakers. The point was made that court reporters provide an essential role as an independent, neutral recorder of the deposition. This same point could just as well have been made respecting persons who videotape a deposition, for the same rules (Rule 28(c) and Rule 29) prescribe standards regarding the independence of such persons.

As I emphasized at the hearing, this rule does not in any way affect the use of court reporters to record trials and does not indicate any disaffection by the judiciary with the recording of trial proceedings by court reporters.^{1/} In this connection, it may be noted that another Judicial Conference committee within the last two weeks has concluded that the current experimentation with video-taping of trials in lieu of a stenographic transcript should not be extended, and that the overwhelming majority of district judges have continued to have proceedings before them recorded by a court reporter rather than by adopting the alternative for audio-recording equipment.

I will be happy to respond to any further questions the Subcommittee may have and, as earlier indicated, stand ready to work with your staff in providing technical assistance should — which I hope will not occur — legislation be pursued.

Sincerely,



Sam C. Pointer, Jr.

encl: Revision of Prepared Remarks

1. It may be noted that there are competency standards governing the employment by federal courts of official court reporters. There are no such standards respecting those who are employed by parties to transcribe a deposition. Market-place considerations, however, have generally resulted in relatively few incompetent freelance reporters being employed to record depositions.

APPENDIX 16.—LETTER FROM PATRICIA M. HYNES, CHAIR, COMMITTEE ON FEDERAL COURTS, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK (WITH ATTACHMENTS), TO HON. WILLIAM J. HUGHES, JUNE 23, 1993

THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK
42 WEST 44TH STREET
NEW YORK N.Y. 10036-6690

COMMITTEE ON FEDERAL COURTS

PATRICIA M. HYNES
CHAIR
ONE PENNSYLVANIA PLAZA
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FAX # (212) 868-1229

SANFORD P. DUMAINE
SECRETARY
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FAX # (212) 868-1229

June 23, 1993

VIA FEDERAL EXPRESS

Hon. William J. Hughes, Chair
House Judiciary Subcommittee on Intellectual
Property and Judicial Administration
Room 207
Cannon House Office Building
Washington, DC 20515

Re: Congressional Consideration of Proposed
Amendments to the Federal Rules of
Civil Procedure

Dear Congressman Hughes:

On behalf of the Committee on Federal Courts of the Association of the Bar of the City of New York, I wish to submit for your consideration the Association's comments regarding proposed amendments to the Federal Rules of Civil Procedure, which were transmitted to Congress by the Supreme Court on April 22.

These written comments were previously submitted to the Civil Rules Advisory Committee of the Judicial Conference when it was considering this package of amendments. The Association also testified before the Advisory Committee at its hearing in Atlanta on February 19, 1992. As you may know, we contacted Subcommittee staff and requested to testify at the June 16 hearing on this matter. We were informed that this would not be possible but that we could submit written comments for the record due by June 25. The remainder of this letter updates and amplifies our earlier comments and is submitted with them for the record of the hearing.

As more fully described in the enclosed comments, the Association opposes the disclosure and discovery changes because:

--The disclosure system will add an additional layer of discovery and pretrial procedure that is likely to increase cost rather than streamline litigation;

--The novelty of the disclosure scheme presents opportunities for strategic behavior designed to delay actions or raise an opponent's costs rather than to truly illuminate the issues in dispute;

--To have any chance of being effective, disclosure must be closely supervised by trial judges or magistrate judges who are already pressed for time and who have historically been unenthusiastic about policing the existing discovery mechanism. In our view, the time and effort of the bench would be better spent in "riding herd" on the existing system with which attorneys are familiar rather than wading into a new arena that can quickly turn into a preliminary round of litigation activity that merely precedes and enlarges upon the already existing discovery mechanism;

--At least during the early years of its use, the disclosure system would be subject to conflicting interpretations, requiring substantial expenditures of judicial time. This is inevitable even though the drafters of the proposed rules have attempted to employ concepts and language already in use in discovery;

--Because the disclosure system is linked to broadly worded duties set forth in the proposed rule rather than targeted inquiry designed specifically for the case by one's opponents, lawyers and litigants responding to disclosure will be more likely to evade revealing full information because they will seek a narrower interpretation of the disclosure requirements than is possible under the discovery mechanism. Consequently, disclosure without discovery holds potential for injustice. Most lawyers will deal with this problem by conducting discovery on top of disclosure;

--The disclosure mechanism creates obvious tensions with the lawyer's ethical duty to represent a client zealously under our existing adversary system of justice. If the federal courts are to modify the adversary model, this should only occur as part of a comprehensive and integrated reform effort. Amending part of the

federal rules to attempt to make fact-gathering less adversarial will not work well and will create occasional injustices, particularly if the lawyers and clients have differing or idiosyncratic notions of their rights and responsibilities. Although some of this tension already exists under the current discovery system, mandatory disclosure will exacerbate the problem. Discovery requires only that lawyers respond fairly to pointed inquiry. Mandatory disclosure would require lawyers to do some of the thinking for their opponents.

--Making mandatory disclosure part of the Federal Rules is particularly unwise at this time. As you know, in 1990 Congress enacted the Civil Justice Reform Act, which requires each of the 94 federal judicial districts to in effect experiment with discovery reform as part of the Delay and Expense Reduction Plans that each district must file by the end of this year. Although many of the Plans already adopted provide for some variant of disclosure, many do not. By comparing the experiences of the various districts, the Judicial Conference and Congress can during the next few years come to a more reasoned assessment of what works and what does not work in the continuing effort to improve the speed, efficiency, and quality of civil litigation.

Although there have been two significant changes in the disclosure rule since the Association originally commented, they do not in our view rectify the serious problems of the proposed disclosure rule. First, the most recent Proposed Amended Rule 26 before your Subcommittee allows district courts to opt out of disclosure by local rule. Although this helps to alleviate our concerns about the clash between disclosure and the CJRA, it nonetheless creates an unacceptable inertia that works to prompt many federal district courts to accept disclosure even though their CJRA plans rejected it. Second, the disclosure obligations would be triggered only when a claim is "pleaded with particularity," borrowing the phraseology of current Fed. R. Civ. P. 9(b), which requires fraud to be pleaded with particularity. Unfortunately, as evidenced by cases arising under Rule 9(b), one court's particularity can be another court's vagueness. See Charles Alan Wright & Arthur Miller, Federal Practice and Procedure §§ 1297, 1298 (Supp. 1992) (citing and describing cases illustrating range of judicial views as to what constitutes sufficient particularity). As a result, some uncertainty and confusion is inevitable.

The Association's main misgivings about the proposed amended rules concern disclosure. However, we also are concerned about the proposed presumptive limits on the number of

interrogatories and depositions, particularly depositions. Proposed Amended Rule 30 would establish a presumptive limit of 10 depositions. This proposal would enable parties to hide information or delay litigation by refusing to produce germane witnesses so that opponents would exhaust their presumptive quota of discovery, thus sparking additional, wasteful motion practice. All of the burden of going to court for relief in such instances would fall upon the party seeking information, a result we find troubling. There is no evidence to suggest that overdiscovery is more prevalent than stonewalling. Both forms of discovery abuse are blameworthy. However, presumptive limits on discovery, which can only be overridden when a party shoulders the additional expense of making a motion to the court, err towards permitting stonewalling and the development of less information.

Although the Association would have rewritten Fed. R. Civ. P. 11 differently than did the Advisory Committee, we are on the whole satisfied with the changes, particularly the change made by the Judicial Conference so that a federal judge is not required to impose a sanction for every violation of the Rule, no matter how trivial or debatable. Existing Rule 11 has proved problematic and requires alteration. We thus urge Congress not to interfere with the pending change to Rule 11.

Other than the points noted above and in our enclosed comments, the Association has no dispute with the proposed pending Civil Rules amendments.

In addition, I would like to correct an unfortunate misconception promoted by some advocates of the amendments, who have characterized the proposed "disclosure" mechanism and discovery changes as benign reforms opposed by a self-interested bar. See, e.g., Richard B. Schmitt, "Lawyers Unite Against Plan to Speed Suits," Wall Street Journal (June 8, 1993) at B1 ("Lawyers of all stripes are coming together in the name of a major legal-reform proposal--to kill it"). This portrayal, in addition to being cynical, is dramatically inaccurate.

The organized bar has not overwhelmingly opposed the proposed new disclosure rules because we expect them to reduce our ability to extract fees from hapless clients. Rather, our Association opposes these changes because we expect them to create additional litigation "busywork" that increases client costs with no discernable benefit and significant risk that the new rules would be used to delay and obfuscate the resolution of disputes.

Although some advocates of the rules change argue that the bar's perspective results only from self-interest, this view is refuted by the dissent against disclosure of Justices Scalia, Thomas and Souter, who, as lifetime judicial appointees unlikely to enter private practice, obviously have no financial self-interest in this matter.

Most important, I want to stress that as a bar association we strive to ensure that our public interest activity is divorced from the more narrow concerns of our own pocketbooks or those of our clients. When acting as the Association, whose 19,000 members have a diverse array of practices, clients, and personal political preferences, our only client is the public interest in an effective justice system. Over the years, I believe any reasonable observer would concur that we have largely achieved that goal and acted as an expert policy organization rather than a narrow trade group. It is on behalf of the public interest that we have criticized the proposed disclosure and discovery changes.

I close by urging Congress not to shrink from exercising its right to police federal court rulemaking. Recently, one scholar described the proposed disclosure rules as lacking persuasive empirical support and being the product of relatively unguided Advisory Committee and Judicial Conference discretion. See Laurens Walker, A Comprehensive Reform for Federal Civil Rulemaking, 61 Geo. Wash. L. Rev. 455, 460-63 (1993). Although still largely a proponent of judicially led rulemaking, Prof. Walker found the current situation sufficiently distressful that he advocated a major revision of the rulemaking process, requiring administrative agency-like explanations and justifications for any rules changes.

The Association, of course, takes no position on reform of the Rules Enabling Act at this time. However, we note that the traditional wide discretion accorded to the Advisory Committee, the Standing Committee, and the Judicial Conference (with minimal review by most members of the Supreme Court) has historically not been problematic when it reflects the consensus of the legal profession. But when rulemakers advocate changes opposed by an overwhelming majority of the legal profession without field testing of the proposed amendments, this may work considerable mischief. Ten years ago, Rule 11 was amended without sufficient public comment or reflection. Today, we are forced by adverse experience to revise Rule 11. Congress should prevent the same mistakes in the context of disclosure. The rights of litigants are too important to keep "learning the hard way" in such matters.

Please do not hesitate to contact me or the Association should you or your staff have questions or desire additional information.

The Association appreciates the care and oversight of Congress in this matter.

Respectfully,

Patricia M. Hynes, Chair
Committee on Federal Courts
Association of the Bar
of the City of New York

PMH/cpl

Enclosure

November 19, 1991

The Honorable Robert Keeton, Chair
 Committee on Rules of Practice and Procedure
 Judicial Conference of the United States
 Administrative Office of the United States Courts
 1120 Vermont Avenue
 Washington, DC 20544

Re: Proposed Amendments to Federal Rules of Civil Procedure

Dear Judge Keeton:

In response to the Rules Committee's Call for Comments regarding the August 1991 Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence, the Committee on Federal Courts (the "Committee") of the Association of the Bar of the City of New York submits its comments.

As you may know, the Association has more than 19,000 members, primarily in the New York City metropolitan area, drawn from law firms of varying size and types of practice. It also includes prosecutors and other lawyers employed by government, legal aid lawyers, law professors, and judges. In short, the Association is a diverse group whose members' assessments are informed by their varying practice experience. The Committee mirrors this diversity in its composition. Although undoubtedly sensitive to the daily problems confronting working lawyers, neither the Committee nor the Association attempts to serve as a representative of an interest group. Rather, the Committee and Association work to improve the quality of our legal system through educational programs, legislative reform efforts, continuing study of law in action, and comments like the following.

This commentary will address the Proposed Amendments seriatim.

Rule 1

The Committee supports the proposed change.

Rule 11

Proposed Amended Rule 11 reflects admirable efforts by the Rules Committee and the Advisory Committee on the Federal Civil Rules ("Advisory Committee") to come to grips with the most vexing civil rule of the 1980s. Since its revision in 1983, Rule 11 has been at the vortex of a "litigation explosion" regarding sanctions. In responding to the Advisory Committee's 1990 Call for Comments,

the Committee joined a chorus of the profession critical of many aspects of Rule 11 and proposing several changes in the Rule.¹

In addition, the Committee proposed an omnibus sanctions rule governing abusive litigation conduct that would serve as a substitute for current Rules 11, 26(g), 37(b)(2)(E) and 56(g). The Committee reiterates its earlier comments and renews its call for a consolidation of civil sanctions in a rule approximating that set forth in Appendix A to these comments (attached).

The Rules Committee appears to have rejected the concept of a consolidated sanctions rule and instead is considering possible further amendment to "make the sanctions provisions in Rules 26 and 37 the exclusive basis for sanctions involving discovery motions and papers."² In our view, such disaggregation would be unwise. One troublesome aspect of civil sanctions practice has been its inconsistency. Rule 11 has seen explosive growth while discovery sanctions are rarely imposed at a time when most attorneys believe there is at least as much discovery abuse as there are frivolous pleadings and motions. By making Rules 26 and 37 the exclusive basis for discovery sanctions, the Rules Committee would only exacerbate this trend.

The practical effect of such unbundling would be to make discovery sanctions even more of a rarity while pleadings and motions would remain relatively common sanction targets, even under the Proposed Amended Rule 11. Although critics of Rule 11 might approve because there would thus be some net decline in sanction orders generally, the Committee is troubled by any move that would increase the asymmetry attending federal practice. Frivolous or abusive discovery conduct should be placed under at least as much fire as frivolous or abusive pleadings and motions. We renew our call for a consolidated, omnibus sanctions rule such as the draft set forth at the conclusion of Appendix A.

Regarding the particulars of Proposed Amended Rule 11, there is much to commend. We applaud the Standing Committee and the Advisory Committee for making substantial strides toward accommodating the legal profession's criticisms of Rule 11. Nonetheless, the suggested new rule continues to contain several troublesome provisions that must be altered if the proposed new rule is to constitute a genuine improvement over current Rule 11.

¹ See Committee on Federal Courts, Comments on Federal Rule of Civil Procedure 11 and Related Rules, 46 THE RECORD 267 (1991) (hereinafter "Comments").

² See Committee on Rules of Practice and Procedure, Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence at 938 F.2d CL, CLXII (August 1991) (hereinafter "Proposed Amendments").

Although we find much merit in the alternative Bench-Bar Rule 11 proposal being circulated by John Frank, Esq. and other prominent attorneys, for purposes of clarity we favor focusing upon the Advisory Committee's Proposed Rule.

The "continuing duty" imposed by Proposed Rule 11(b) reflects a troublesome departure from current Rule 11, where the bulk of authority squarely holds that Rule 11 duties are measured as of the time a paper is filed and that there exists no continuing duty to revise previously submitted papers to accord with Rule 11.¹ We find this proposed revision an unfortunate departure from the bulk of Rule 11 jurisprudence. In our view, the better reasoned cases and the ABA have rejected a continuing duty requirement not only because it is the best technical interpretation of Rule 11 but also because the imposition of a continuing duty under Rule 11 would be unwise policy.

Lawyers and litigants saddled with a continuing duty requirement under Rule 11 would invariably be required to keep looking over their figurative shoulders throughout the case in order to protect themselves from eleventh hour sanctions. Although, it may be true, as the Advisory Committee suggests, that dropping or modifying frivolous assertions is the normal behavior of competent and ethical counsel, this continuing revision throughout the course of litigation usually occurs informally. If Rule 11's text imposes a continuing duty, counsel may well feel, in order to protect themselves, that they must engage in unnecessary and wasteful remedial activities such as amending papers and otherwise protecting their flanks through additional documentation. This would be a most odd result in light of the Advisory Committee's obvious concern over reducing Rule 11 satellite litigation and Rule 11 costs in general.

For example, one might argue that imposing a continuing duty would force defense counsel to streamline boilerplate, blunderbuss form answers that raise a host of often-inapplicable affirmative

¹ See American Bar Association Section of Litigation, Standards and Guidelines for Practice Under Rule 11 of the Federal Rules of Civil Procedure, 121 F.R.D. 101, 112-13 (1988) (hereinafter "ABA Standards"). See, e.g., Dahnke v. Teamsters Local No. 695, 906 F.2d 1192, 1200 (7th Cir. 1990); Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Associated Contractors, 87 F.2d 938, 943 (11th Cir. 1989), cert. denied, 110 S.Ct. 1133 (1990); Thomas v. Capital Securities Servs., 836 F.2d 866, 874-75 (5th Cir. 1988) (en banc). But see Anderson v. Beatrice Foods, 900 F.2d 388, 393 (1st Cir), cert. denied, 111 S.Ct. 233 (1990); Blue v. United States Dep't of the Army, 914 F.2d 525, 544-46 (4th Cir. 1990), cert. denied, 111 S.Ct. 1580 (1991) (although unclear on the point, court suggests it read Rule 11 as imposing a continuing duty).

defenses and make repetitive claims that defendant lacks sufficient information to admit or deny allegations in the complaint. Although we agree that modernizing and correcting such vague and imprecise answers would constitute optimal litigation conduct (putting aside that in an ideal world such a pleading should not have been filed in the first place), it is of little or no benefit to the plaintiff, who will know full well from discovery which averments are seriously contested and which affirmative defenses will actually be raised at trial.

Against this negligible benefit must be weighed more serious costs: the possibility of late-breaking Rule 11 sanctions for the mere "housekeeping" errors of a party that do not evidence significant misconduct. Under the continuing duty standard of Proposed Amended Rule 11, for example, plaintiff could raise and prove a Rule 11 violation because the defendant did not solidify waffling responses or drop inapplicable affirmative defenses. Once detected, of course, this sort of technical but not very serious Rule 11 "violation" would require the court to sanction the defendant. A scenario like this could thus impose substantial collateral costs for no real litigation benefit.

Furthermore, truly egregious continuing conduct will ordinarily result in the submission to the court of an offending paper later in the litigation, thus triggering Rule 11 even if Rule 11 lacks the continuing duty language. As drafted, the continuing duty requirement thus presents the worst of both worlds: it catches relatively few instances of abusive conduct that would not already be within the ambit of the Rule but imposes significant costs upon all lawyers and litigants.

Perhaps more important, a continuing duty requirement may increase the unfortunate tendency of some courts to view unsuccessful claims or assertions as frivolous. A court may find a claim marginal but is constrained to find no Rule 11 violation when forced to measure counsel's decision to proceed under the "snapshot" rule of reference to counsel's knowledge at the time of filing. When permitted to consider additional information and intervening factors, trial courts will have more opportunity to deem frivolous the claims they regard as marginal. They will, invariably, err on occasion and appellate review will not cure all such errors owing in large part to the liberal "abuse of discretion" standard of appellate review for Rule 11. If the aim of Proposed Amended Rule 11 is to bring restraint to Rule 11 practice, this augers in favor of finding no Rule 11 violation in close cases. A continuing duty requirement works against these goals but provides little benefit.

We are also vitally concerned that any continuing duty requirement not become a trap for the unwary or a means by which courts may punish lawyers, parties, or claims it has come to dislike. At a minimum, if the continuing duty language is

retained, Proposed Rule 11(b) must be harmonized with Rule 15(b) which states that issues implicitly tried shall be deemed raised by the pleadings, and Rule 16(e) which provides that pretrial orders control the subsequent course of the action. These rules stand for the proposition that the most recent statements or conduct in litigation pre-empt earlier statements in the pleadings. Good faith, legitimate shifts in emphasis or position are hardly uncommon events in litigation because counsel frequently know far less about the case at the pretrial stage than after discovery and interaction with the opposition.

In a similar fashion, a lawyer should not be placed at risk from Proposed Amended Rule 11(b) when his or her claim, defense, request, demand, objection, contention, or argument targeted by a sanction motion was originally in compliance with Rule 11 and has implicitly been dropped or has not been seriously litigated by the parties. In our view, a contention has not been "maintained" in such circumstances. However, the Proposed Rule suggests that any failure to withdraw the offending assertion violates Rule 11. At the very least, some further protection for attorneys should be added to the Proposed Rule either by specific new language or a strong admonition in the Committee Note that courts must not use the continuing duty standard to engage in the judicial equivalent of "Monday morning quarterbacking."

Proposed Rule 11(b) and (c) also present an interpretative question of substantial concern. Although the text does not appear to require it, some commentators appear to have read the proposal as requiring that counsel specifically denominate whether they assert that legal positions are "warranted by existing law" or instead based on a "nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." Apparently, this view results from the Draft Committee Note statement that "the revised rule places equal emphasis on the duty of candor [as well as on the duty to 'stop-and-think'] before

⁴ The current draft Committee Note appears to support this view by suggesting that a party must abandon a frivolous position either through amendment or "at a pretrial conference" (Proposed Amendments at 938 F.2d at CLXXVI). However, if the continuing duty language is retained, this aspect of Rule 11 practice should be addressed in greater detail.

⁵ See, e.g., J. Frank, J. Napolitano & J. Resnik, Comments on the Proposed Changes in the Federal Rules of Civil Procedure (Rev. ed. Oct. 9, 1991) (hereinafter "Frank, et al."); New York State Bar Association, Commercial and Litigation Section, Comments on the Advisory Committee and Bench-Bar Proposals to Amend Rule 11 of the Federal Rules of Civil Procedure (October, 1991) (hereinafter New York State Bar Comments).

submitting a paper to the court."* The term duty of candor to some observers connotes a requirement that lawyers clearly label whether their contentions are "existing law" or "law reform" arguments. Consequently, some observers fear that proposed revisions to Rule 11 would reinstate and codify the trial court opinion in Golden Eagle Distributing Corp. v. Burroughs,⁶ rather than endorsing the Ninth Circuit's refusal to impose such a requirement.⁷ We agree that Rule 11 should not require counsel to "flag" their legal arguments with bright lights and ironclad specificity. However, we do not read either the text of Proposed Amended Rule 11 or the Draft Committee Note as dictating such a result.⁸ The Advisory Committee should clarify the intent of the revision regarding "argument identification" requirements.

Proposed Amended Rule 11(b)(1) is unobjectionable except insofar as it overlooks an opportunity to clarify practice under the "improper purpose" prong of Rule 11. As the Rules Committee is aware, there exists something of a split among courts on the issue of whether an objectively meritorious paper (*i.e.*, one adequately grounded in fact and warranted by law) can nonetheless violate Rule 11 if it is filed for an improper purpose. Several courts have found such papers sanctionable,⁹ a view endorsed by the ABA Litigation Section.¹¹ Other courts have viewed objectively meritorious papers as insulated from Rule 11 notwithstanding any improper purpose of the filing party or counsel.¹² The Committee

⁶ See 938 F.2d at CLXXV.

⁷ 103 F.R.D. 124, 127 (N.D.Cal. 1984), rev'd, 801 F.2d 1531 1539 (9th Cir. 1986).

⁸ Irrespective of whether it is right or wrong on the merits, the appellate court's Golden Eagle opinion was greeted with a sigh of relief by practitioners, who viewed the district court as improperly expanding Rule 11 and placing too many additional burdens on counsel.

⁹ In context, it seems to us that the Draft Committee Note was referring to the continuing duty requirement of Proposed Amended Rule 11 rather than any implicit requirement of argument identification.

¹⁰ See, *e.g.*, Brown v. Federation of State Medical Bds., 830 F.2d 1429 (7th Cir. 1987); Robinson v. National Cash Register Co., 808 F.2d 1119, 1130 (5th Cir. 1987).

¹¹ See, ABA Standards, 121 F.R.D. at 121 (1988).

¹² See, *e.g.*, Rachel v. Banana Republic, Inc., 831 F.2d 1503, 1508 (9th Cir. 1987); Oliveri v. Thompson, 803 F.2d 1265, 1275 (2d Cir. 1986), cert. denied sub. nom. Suffolk Co. v. Graseck, 480 U.S.

favors the ABA position and views the amending of Rule 11 as an apt time to clarify the matter through brief discussion in the Advisory Committee Notes.

Proposed Amended Rule 11(b)(2) makes a positive contribution by replacing the "good faith argument" for law reform with the term "nonfrivolous argument." This advances Rule 11's aspiration to objective rather than subjective standards governing sanctions practice and brings greater consistency to the prongs (fact, law, law reform, improper purpose) upon which sanctions may be imposed. Unfortunately, the Committee Note provides no guidance regarding the definition of "nonfrivolous" in this context. Adopting the "grounded in fact/warranted by law" definition of frivolousness found elsewhere in current Rule 11 is not ideal because of the differing nature of law reform arguments. Rather, we propose that law reform arguments as well as arguments based on existing law be deemed "nonfrivolous" whenever they could gather the support of a significant number of competent and well-informed attorneys.

For example, evidence that a law reform argument is nonfrivolous within the meaning of Rule 11 would include support in judicial opinions (including dissents), academic commentary, or the positions of legal organizations (e.g., the National Bar Association, state bar organizations, city bar associations). In fact, this type of support for a law reform argument should constitute a virtual safe harbor "proving" that the argument is nonfrivolous. However, the converse is not true. The absence of objective indicia of nonfrivolousness does not imply frivolousness. The test should be whether a significant number of reasonable attorneys would find the argument colorable even if they are unpersuaded by the argument. A definition of nonfrivolousness along these lines should be set forth in the Committee Notes.

The rewording of the fact prong of the rule in Proposed Amended Rule 11 (b)(3) is useful in its explicit recognition of the importance of discovery for the establishment of many claims. In either the text of the Proposed Rule or the Committee Notes, it would be useful to state that a court's primary focus in assessing compliance with Rule 11 should be the conduct of counsel and parties rather than the resulting product. If, for example, a lawyer had conducted extensive fact investigation and legal research but asserted a claim or defense viewed as unjustified by even a large majority of the bench, a court should hesitate to deem this a violation of Rule 11, even if it finds the lawyer's legal reasoning as applied to the facts to fall below the standard of the hypothetical reasonable attorney so long as the claim or defense was not interposed for an improper purpose. In essence, the lawyer's conduct is reasonable, clearly so, even if the quality of his product is subject to dispute. By focusing on conduct rather

than product, Rule 11 jurisprudence would encourage careful lawyering but minimize the situations in which sanctions are awarded merely because the court sees things differently from counsel.

The Committee continues to believe that Rule 11 practice would be improved if the Rule were discretionary rather than mandatory, and thus disagrees with the continuation of mandatory sanctions contained in Proposed Amended Rule 11(c). The Committee understands the view that conduct violative of Proposed Amended Rule 11 is likely to be sufficiently blameworthy as to justify mandatory sanction. Nonetheless, we continue to believe that there will remain a significant number of Rule 11 cases where a party or lawyer is in violation of the Rule but has not acted in a reprehensible way. Requiring Rule 11 sanctions in such cases seems unjust. When the Rule is mandatory, courts are often tempted to conclude in error that there is no violation in order to avoid this unfairness. Thus, a mandatory Rule 11 does not guarantee a consistently applied Rule 11. In addition, a court retains substantial discretion in selecting a sanction. All of these trial court prerogatives are reviewed under the relatively lenient "abuse of discretion" standard. In short, practice under even the Proposed Amended Rule 11 will likely continue to be characterized by individual judicial variance. Under these circumstances, the Committee prefers that such variance be openly acknowledged through a discretionary standard rather than masked through the mandatory language.

The Committee otherwise agrees with the language of Proposed Rule 11(c), particularly its express recognition that Rule 11 targets must have adequate notice and a reasonable opportunity to be heard. The Committee also endorses Rule 11(c)'s overruling of Pavelic & LeFlore v. Marvel Entertainment Group,¹³ which limited Rule 11 liability only to lawyers who physically signed an offending paper.

The Committee also generally approves of the "safe harbor" provisions of Proposed Rule 11(c)(1)(A) which provide a 21-day opportunity for a warned target of a prospective Rule 11 motion to withdraw the offending item and avoid sanctions. However, a substantial portion of the Committee views this as too safe a harbor. If, for example, a claimant has made baseless allegations that result in years of litigation,¹⁴ the language of the proposed

¹³ 493 U.S. 120 (1989).

¹⁴ See, e.g., Dayan v. McDonald's, 126 Ill.App.3d 11, 466 N.E.2d 945, 81 Ill.Dec. 143 (1984) (Parisian fast food franchisee obtained preliminary injunctive relief and prompted years of litigation through false claims and affidavits but was ultimately assessed \$1.3 million in sanctions pursuant to state version of 28

rule would appear to preclude Rule 11 sanctions if the offending claimant withdrew the allegations when finally "the jig is up" by virtue of a pending Rule 11 motion. Clearly, such insulation from sanctions liability is unfair to the Rule 11 movant that has expended thousands of dollars in counsel fees during the pendency of the baseless claim.

We do not believe it is a sufficient answer to this concern that in cases of outrageous conduct, the offending lawyer will often be subject to sanctions pursuant to 28 U.S.C. §1927 or a fee-shifting statute. In many cases of outrageous conduct, the parties are at least as culpable as counsel but are less easily reached by sanction devices other than Rule 11. Although courts retain substantial inherent power to punish outrageous conduct, particularly in the wake of Chambers v. Nasco, Inc.,¹⁵ this tool is subject to the criticism that it lacks sufficiently clear standards of application.¹⁶ Where there exists a specific federal rule governing a type of litigation misconduct, courts should be hesitant to invoke their inherent powers to reach what the Rule does not.

In fact, the Committee believes that Proposed Rule 11 should be further revised to provide that its procedural protections apply to any judicial imposition of sanctions, even those ordered pursuant to 28 U.S.C. §1927 or the court's inherent power. Whenever counsel is targeted for sanctions, he or she should have specific notice of the alleged violation and an opportunity to be heard as well as an articulated rationale for any resulting sanction.

However, to prevent the proposed safe harbor from becoming impregnable, the Committee recommends that Proposed Rule 11(c)(1)(A) be modified to permit continued pursuit of Rule 11 sanctions despite a withdrawn item upon application to a Magistrate Judge. If the Magistrate Judge agrees that the outrageousness of the conduct justifies an exception to the safe harbor of voluntary withdrawal, leave would be granted to file the Rule 11 motion with the court for decision. The party seeking Rule 11 sanctions despite voluntary withdrawal should be required to demonstrate such outrageously abusive conduct by clear and convincing evidence.

U.S.C. §1927).

¹⁵ ___ U.S. ___, 111 S.Ct. 2123, reh'g denied, 1991 U.S. Lexis 4061 (1991)(affirming award of approximately \$ 1 million in sanctions pursuant to district court's inherent power).

¹⁶ See 111 S.Ct. at 2146, 2152 (Scalia, J., dissenting; Kennedy, J., joined by Souter, J. and Rehnquist, C.J., dissenting).

The Committee approves the language of Proposed Amended Rules 11(c)(2) regarding the amount of sanctions and particularly approves the codification of the "least severe sanction" approach.

The Committee disagrees with Proposed Rule 11(c)(2)(A), which provides that a represented party may be sanctioned only for items that violate the improper purpose prong of Rule 11. This limitation is peculiarly inapt in light of the absence of any consensus as to exactly what constitutes a sufficient indication of an improper purpose. Parties should be subject to Rule 11 for violations of its fact prong as well. Despite the Rule's aspiration that lawyers conduct independent factual investigations, and thereby uncover those instances in which they have been misled by their clients as to the facts, the reality is that even diligent lawyers are often crucially dependent upon their clients to develop the facts surrounding a dispute.

Where clients fail to aid the lawyer's inquiry, to produce documents or to give candid accounts, they must be as subject to Rule 11 as are the lawyers who fail to make a reasonable inquiry. The Committee appreciates that this provision attempts to avoid any potential infirmity of Rule 11 under the Rules Enabling Act¹⁷ alluded to in Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.¹⁸ Nonetheless, we continue to believe that holding clients accountable for reasonable inquiry into the fact prong of Rule 11 abridges none of their rights under the law. In the wake of Chambers v. Nasco, Inc.,¹⁹ a court's inherent power to sanction parties is quite broad. Under these circumstances, a requirement that clients be held to the same standard of conduct as lawyers regarding factual investigation does not violate the Enabling Act and encourages candor from the parties as well as counsel.

Although limiting party sanctions to the improper purpose prong of Rule 11 reduces the potential for difficulties in the attorney-client relationship that can accrue when both are faced with a Rule 11 motion alleging violation of the fact prong of the Rule, this does not provide sufficient support for permitting represented parties to avoid their obligations as litigants adequately to assist (and certainly not to mislead) counsel in reasonable investigation into the facts of the dispute. Furthermore, limiting client sanctions to improper purpose violations will hardly eliminate potential attorney-client

¹⁷ 28 U.S.C. §2072, which provides that Rules promulgated under the Act can not "abridge, enlarge, or modify any substantive right."

¹⁸ 111 S.Ct. 922 (1991).

¹⁹ 111 S.Ct. 2123 (1991).

tensions. Instead of pointing fingers at one another over defective fact investigations, lawyers and clients at odds will instead point fingers regarding the motivation underlying the litigation.

We agree, however, that clients should have somewhat more insulation from Rule 11 than do lawyers. Consequently, the Committee reiterates its earlier view that represented parties should be subject to monetary sanctions only where the court makes specific findings that the party's violation of Rule 11 resulted from conduct that was done in subjective bad faith. Although this standard, which had been the governing test in the Second Circuit, was rejected by the Supreme Court in Business Guides²⁰ on the basis of the text and structure of the current rule, neither the Court nor anyone else has convincingly argued that the subjective bad faith standard for clients is bad public policy. On the contrary, the standard would grant clients a wide zone of protection but would provide appropriate incentives for proper behavior.

Although the Committee has reservations about the "voluntary dismissal" safe harbor from sua sponte monetary sanctions established in Proposed Amended Rule 11(c)(2)(B) for the same reasons it has misgivings about the broad safe harbor of Proposed Rule 11(c)(1)(A), it accepts the Rule 11(c)(2)(B) approach under the assumption that in cases of genuinely outrageous conduct, which will often involve gross deception, the matter is far more likely to be brought to the court's attention by the motion of a party rather than the court's own motion. Consequently, if Proposed Rule 11(c)(1)(A) is revised pursuant to the Committee's suggestion, it would not view the sua sponte safe harbor as unreasonably protective of Rule 11 violators.

Regarding Proposed Amended Rule 11(c)(3), the Committee recommends that courts imposing Rule 11 sanctions be required to make written findings of fact and conclusions of law, regardless of whether they are requested by a party. Although due process does not strictly require such written findings, we believe it would be wise to require that sanctioned parties and counsel have the benefit of such a precise writing rather than the less tailored remarks of the court at a hearing or in chambers. Trial judges should be suitably reluctant to impose Rule 11 sanctions and requiring them to render written findings and conclusions as part of the sanctions decision tests the seriousness of their conviction that Rule 11 has been violated and imposes an apt period for reflection. Faced with such a requirement, courts are less likely to impose Rule 11 sanctions in anger or from tensions of the moment. A requirement of written findings and conclusions in effect functions as a "stop and think" rule for the courts.

²⁰ Business Guides, Inc. v. Chromatic Communications Enterprises, Inc., 111 S.Ct. 922 (1991).

Regarding the draft Committee Note accompanying Proposed Amended Rule 11, we particularly approve the view that evidence sufficient to defeat a motion for summary judgment is sufficient evidentiary support to insulate a party from Rule 11 sanctions under the fact prong of Rule 11.²¹ The Committee also particularly endorses the Note's language limiting any monetary sanction to losses directly flowing from conduct violative of Rule 11 and the Note's admonition to courts that Rule 11 sanctions should not be inconsistent with the substantive law of fee-shifting statutes such as 42 U.S.C. §1988.

Rule 16

The Civil Justice Reform Act of 1990, 28 U.S.C. § 473(a)(1), proposes "individualized and specific case management" as a guiding principle behind the new rules. In many respects, Proposed Amended Rule 16 furthers that goal in that the amendments ensure that the Court will become familiar with the issues in the case at its early stages. Cases should proceed more expeditiously because the Court will have the opportunity to refine the disputes between the parties by focusing, scheduling, and perhaps narrowing discovery with a view towards simplifying the issues for trial as well as eliminating some claims and defenses while establishing ground rules and procedures for necessary but not unduly burdensome discovery. In addition, the Court may initiate discussions concerning settlement.

The Committee believes that the subject matters identified in the proposed rule are appropriate for consideration and discussion by counsel. The judicial officer may make such determinations even at an early stage in the case, with the understanding that these matters will be revisited at a second conference after discovery has been completed or is close to completion after having been conducted upon a realistic schedule agreed to by the parties. This will enable the District Judge (or Magistrate Judge) to evaluate the complexity of the case, the positions of the parties and the likelihood that some issues may be disposed of by motion pursuant to Rule 56 or separate trial pursuant to Rule 42(b). The Court may also at this initial conference schedule preparation of a pretrial

²¹ See Proposed Amendments, 938 F.2d at CLXXVI. The Note could give greater guidance to courts and discourage inappropriate imposition of Rule 11 sanctions by also stating that a claim which survives A Rule 12 motion or summary judgment motion is also sufficiently warranted by existing law or a nonfrivolous law reform argument that it can not later be sanctioned upon these grounds. See Stempel, Sanctions, Symmetry, and Safe Harbors: Limiting Misapplication of Rule 11 by Harmonizing It with Pre-Verdict Dismissal Devices, 60 FORDHAM L.REV. 501 (1991)(forthcoming).

order regarding the issues that remain in serious dispute and to establish a pretrial briefing schedule.

As proposed, Rule 16(b) provides the opportunity for the judicial officer to fashion, limit and restrict discovery pursuant to a schedule agreed to by the parties or, in absence of such agreement, as ordered by the Court, taking into consideration specific issues and problems raised by the case.

After the pretrial order is submitted, the Court should conduct a "final pretrial conference" to attempt to settle the case. In many cases, it may be helpful for the parties or the insurers to attend this final conference.

With respect to reservations about Proposed Rule 16 by other commentators,²² we appreciate the concern that early pretrial conferences, if misused by the court, could result in premature determinations of important substantive matters. On balance, however, the Committee believes that the benefits of hands-on case management by the Court at various stages in the litigation outweigh concerns about timing or hurried decision making. All rules require prudent exercise of judicial discretion. Rule 16 is no exception. The parties always may request a conference with the Court or Magistrate Judge if any difficulties during discovery arise. The Court will have the power to exercise its considered judgment with a view towards expediting either settlement or trial of the action. Nonetheless, the Advisory Committee should seriously consider extending somewhat the time period for conducting the initial conference. However, since there exists considerable delay in scheduling civil actions for trial owing to the criminal docket, there appears to be little need to set a trial date within eighteen months of the filing of a complaint of the initial Rule 16 conference.

Rule 26(a)(1) (the "Disclosure" scheme)

Proposed Amended Rule 26(a) provides that, unless altered by local rule, parties to litigation shall disclose "baseline" information (naming persons with knowledge of the dispute, identifying documents, outlining damage claims, disclosing insurance agreements and providing a copy of relevant insurance policies) and expert information (discussed in more detail below) to other parties prior to receiving discovery requests. This is to occur within 30 days of service of the answer or "in any event"

²² See Frank, et al., supra note 5.

within 30 days after receipt of another party's disclosures and written demand for early disclosure."²³

The Committee does not object to the early exchange of basic information about the case so long as this can be accomplished efficiently. However, the Committee harbors substantial concern that the disclosure provisions of the proposed rule will add relatively little to the expeditious processing of civil litigation while simultaneously imposing reasonably significant transaction costs upon the system by requiring counsel and courts to learn, interpret, and apply new rules provisions. We are also concerned about the proposed rule's potential intrusion upon lawyer-client relationships in the adversary system.

Although the civil litigation system faces substantial difficulties, it was not our understanding that assembly of baseline discovery was one of these systemic flaws requiring correction.²⁴ A major Federal Judicial Center study of discovery controls found not only that half of federal cases concluded with no discovery but also that most discovery requests were eventually satisfied.²⁵ This study did not analyze the content of discovery sought or resisted but its findings certainly cannot be read as suggesting that lawyers are unable to obtain baseline information.²⁶

²³ In addition, prior to trial, all parties are required to disclose witness information and identify documents and depositions planned for use at trial.

²⁴ A Rand Institute for Civil Justice Study of case terminations in the 1971-86 period found approximately 40 percent of cases terminated with no court involvement (and, implicitly, no discovery imbroglios). See T. Dungworth & N. Pace, Statistical Overview of Civil Litigation in the Federal Courts 26-29 (1990). On average during this time, an additional 35 percent of the cases terminated by motion. To the Committee, this suggests that lawyers can generally obtain basic information used to drop a case, settle a case, or isolate dispositive issues in a case. Although too many resources may be spent obtaining the information, this appears certainly not to occur in a great many federal cases.

²⁵ See P. Connolly, E. Holleman & M. Kuhlman, Judicial Controls and the Civil Litigation Process 18-25, 29 (Federal Judicial Center 1978) ("Connolly").

²⁶ The Connolly study, although perhaps dated since it was published in 1978, remains one of the most comprehensive and authoritative empirical examinations of actual discovery practice. Ironically, few of its findings support the proposed discovery amendments, and in some cases they contradict the assumptions underlying the proposed amendments. See *infra*, discussing limits on depositions and interrogatories.

The Committee members have not encountered such difficulty in their own practices. In the absence of required disclosure, competent counsel almost always obtain baseline information in the "first wave" of discovery, as they have for more than 50 years without benefit of a disclosure mechanism distinct from the discovery rules.

Problems do appear to exist regarding the delay faced by requesting parties in obtaining information. Responding parties are slow to provide discovery and often need the prodding of a Rule 37 motion.²⁷ One study found that only 20 percent of discovery requests were answered within the 30 days provided by the Federal Rules; however, 80 percent were responded to within four months.²⁸ Some may interpret this as evidence that even basic discovery is unduly delayed. Another explanation, one which the Committee finds plausible, is that attorneys in good faith stipulate, with court approval, to enlarge discovery response times where discovery requires more than the 30 days provided in the Rules. Certainly, minimal delay of this sort is not a particularly acute failing of the federal system and may in fact be a necessity. Although the proposed disclosure provisions may speed the pretrial and settlement process somewhat, this potential gain may prove illusory, too costly, or negligible in relation to the costs of its implementation when compared to the overall problem of litigation expense and delay.

As previously noted, a large percentage of federal court cases involve no discovery.²⁹ In these cases, informal exchange and

²⁷ See Connolly, supra note 25, at 18-25. Although this study found either the making of a Rule 37 motion or the Court's order resulted in discovery production in approximately 90 percent of cases studied (id. at 20), judges seldom awarded counsel fees to the prevailing party. Further, requesting counsel were often slow to bring a Rule 37 motion. Occasionally, lawyers decline to pursue even meritorious Rule 37 motions because of the expense and opportunity cost involved. These findings, to the extent they reflect the contemporary situation, suggest that judges should more frequently order payment of counsel fees pursuant to Rule 37 in order to facilitate use of the Rule. This conclusion also supports the Committee view that Rule 37 should not be made the exclusive basis for discovery sanctions (eliminating Rule 11) unless Rule 37 is enforced far more vigorously than it has been during the past 50 years.

²⁸ See Connolly, supra note 25, at 18.

²⁹ According to preliminary findings of the Eastern District of New York Discovery Project (M. Berger, Reporter), data from 1986-1990 show nearly one-half of cases terminated without any formal discovery.

settlement occur without required disclosure. In more complex or contested matters, the disclosure provisions will not eliminate counsel's need to conduct at least a modicum of discovery in order to assess the litigation. Here, required disclosure may speed earlier exchange of basic information without speeding completion of discovery or case disposition and thus may not decrease delay or lower legal expenses at all (*i.e.*, complying with the disclosure requirements will require as much attorney time as acquisition of baseline information via discovery). In addition, in many complex cases, legal issues (and not factual issues) are dispositive. In short, the Committee feels the disclosure mechanism as currently envisioned will not bring sufficient benefit to justify the costs of change.

Some cost is inherent whenever a new rule, mechanism, or system is implemented. For example, courts will undoubtedly face litigation over the question of what comprises "information that bears significantly" on the claims and defenses of litigation and requires that a witness be listed through disclosure declarations. Similar motion practice will likely focus upon the concept of "documents reasonably likely to bear significantly" on claims and defenses as well as what constitutes sufficient "computation of any category of damage."¹⁰

Judges will ordinarily decide disclosure disputes with wisdom and common sense, but this consumes judicial resources. Eventually, a body of "disclosure law" arises so that counsel will have sufficient guidance for compliance with the new rule language. In the meantime, open questions will be litigated, with some positions bordering on the frivolous. The Proposed Amended Rules admit that adoption of the disclosure provisions will require an increase in the bar's level of professionalism. However, even with a substantial rise in the level of professionalism, significant costs will attend the new rules, at least at the outset.¹¹

¹⁰ Although the case law of existing discovery devices may provide some guidance for resolving such disputes, the Committee doubts that courts can completely import discovery precedent to disclosure controversies. For example, at the disclosure stage, it may often be unreasonable to expect the same degree of precision expected of damage calculations occurring later in the pretrial proceedings. This concern is echoed by Frank et al., supra note 5, at 7-9.

¹¹ Even well formulated arguments favoring the disclosure mechanism have, in the Committee's view, underestimated this factor. See, e.g., Schwarzer, Slaying the monsters of cost and delay: would disclosure be more effective than discovery?, 74 Judicature 178, 182-83 (Dec.-Jan. 1991).

The Draft Committee Note clarifies the meaning of the phrase "information that bears significantly" as it pertains to witnesses by explaining that persons with "significant" information are those who, if their potential testimony were known, "might reasonably be expected to be deposed or called as a witness by any of the parties." The notes do not clarify the phrase as it pertains to documents, however. We believe that Proposed Amended Rule 26(a), if adopted at all, should be redrafted so as to incorporate in its text specific guidance and clarification.

Even as clarified, however, it is clear that an attorney cannot decide what is "significant" without giving an adversary the benefit of the attorney's wits. Thus, a very troubling aspect of Proposed Amended Rule 26(a) is its impingement upon the traditional adversary system and the proprietary nature of an attorney's assessment of the case. Although Proposed Amended Rule 26(a)(1)(B) requires only a "general description" of documents "reasonably likely to bear significantly on the claims and defenses" of the matter, the Proposed Rule holds potential for mischief. If, for example, it is interpreted to require that disclosing counsel not only produce documents supporting the client's position but also produce those that may be creatively be used to undercut the client, the disclosing counsel's insights may indirectly be tapped by opponents. Although this may not amount to the wholesale borrowing of the wits of another lawyer,³² it could come uncomfortably close. To require counsel at the outset of litigation to make judgments that may accrue to the benefit of the opposition raises serious professional concern. As an alternative version of Proposed Amended Rule 26(a)(1)(B), the Committee proposes that any required disclosure mandate only that counsel produce documents used in support of the allegations of the pleading filed by the disclosing party.

The Draft Committee Note also seems to narrow the document disclosure requirement to include only documents, data, and tangible things "in the possession, custody, or control" of the disclosing party. The Note or a revised amendment should, however, also clarify whether the witness disclosure provision applies only to the disclosing party's witnesses. Must a lawyer acting under Proposed Amended Rule 26(a)(1)(A) advise other parties of witnesses favorable to them? If the Advisory Committee reads this disclosure provision broadly, either the amended Rule or the accompanying Note should state this with greater clarity. If the Advisory Committee envisions such a broad disclosure mechanism, it should consider

³² See, e.g., Hickman v. Taylor, 329 U.S. 495 (1947) (Jackson, J., concurring) ("Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary. . . . I can conceive of no practice more demoralizing to the Bar than to require" disclosure of trial preparation materials).

whether this type of "ultra-disclosure" is fundamentally inconsistent with the adversary system.

We read Proposed Amended Rule 26(a) as providing that, in the absence of a written demand for disclosure, a party's motion in lieu of an answer tolls the time for making disclosure. Where a party, particularly one whose own disclosure burden is light, demands early disclosure notwithstanding a pending motion, the Committee presumes that the movant may seek a stay of disclosure from the Court. Trial courts must give serious consideration to a stay of the disclosure requirement during the pendency of motions made at the outset of litigation (e.g., lack of personal or subject matter jurisdiction; improper or inconvenient venue; failure to plead fraud with sufficient specificity; adequacy of class representative, official immunity; expiration of limitations period). We support additional language to this effect in either a revised draft Rule 26(a) or the Committee Note.

Lawyers are unlikely to use baseless motions as a means of delaying disclosure. Although some lawyers may use early motions as a tactic for delaying required disclosure, they do so at peril of sanctions unless the motion has merit. In addition to controlling discovery, courts can also often expedite litigation by focusing on early motions at the initial pretrial conference or through a standard practice of holding hearings on the motion. This should provide an early assessment of both the merits of motions and a more expedient manner for proceeding with the case. Until the court has addressed threshold motions, required disclosure will in many cases only tend to increase legal fees.

The Draft Committee Note to Proposed Amended Rule 26 states that "Interrogatories should no longer be needed to obtain

" Rule 9(b), requiring that fraud be pleaded with particularity, provides an example of differing local conditions that might affect the wisdom of adopting the disclosure amendments. In many regions of the country, Rule 9(b) motions are seldom made and rarely granted. In New York, the large number of securities fraud cases has made Rule 9(b) motions more frequent, with the Second Circuit's generally requiring more of claimants than have other courts interpreting Fed. R. Civ. P. 9(b). See, e.g., Denny v. Barber, 576 F.2d 465 (2d Cir. 1978). Consequently, although the pendency of a Rule 9(b) motion does not automatically stay discovery and should not automatically stay disclosure, a stay will be appropriate in many cases, especially in jurisdictions such as the Southern District of New York. Proposed Rule 26(a) should not effectively repeal Fed. R. Civ. P. 9(b). See also Beck v. Cantor, Fitzgerald & Co., 621 F. Supp. 1547, 1552-53 (N.D.Ill. 1985) (plaintiff should not file expensive, reputation-damaging claim of fraud without some specific allegations in mere hope that discovery may "put meat on bare bones of fraud claim").

[disclosure] information." Does this mean that a lawyer propounding an interrogatory about baseline information (perhaps as a check on the veracity of opposing counsel or parties) has violated the discovery rules and is vulnerable to sanction (or has one merely "wasted" an interrogatory)? At a minimum, this should be clarified. The Committee further suggests that disclosure not be the exclusive means for obtaining baseline discovery. Notwithstanding the option of moving for sanctions for noncompliance with the disclosure, counsel should be permitted to seek discovery on these issues if this is viewed as tactically useful (subject, of course, to other limitations on discovery).

Rule 26(a)(2) (Disclosure of Expert Testimony)

The Committee generally endorses both the purpose underlying Proposed Amended Rule 26(a)(2) regarding information related to expert testimony as well as the Proposed Rule's requirements and the greater availability of depositions of experts. However, we note some disagreement:

--even where the party procuring an expert has produced the required disclosure report, the rule should explicitly provide that other parties should be able to depose the potential trial expert as a matter of right without being required to seek leave of court.

--in addition, the 30-day period established for providing disclosure of expert rebuttal information is too short to be realistic where the expert witness issues are extensive or complex;

--whatever expert discovery or disclosure rules exist should not be subject to variation by local rule, although individual judges should retain the power to modify time limits and control use of experts in particular cases.

Proposed Amended Rule 26(a)(3) (Pretrial Disclosures)

Although the Committee has no objection to the disclosure of witnesses, deposition use, and document use for trial, perhaps, as we suggested in our comments regarding the March draft; the disclosure goal would be better achieved through an amendment requiring a final pretrial order and mandating completion of the order more than 21 days prior to trial. The process of exchanging information and collaborating on the final pretrial order would focus the attention of counsel on both the stakes and merits of the dispute as well as the impending burden of trial but would do so sufficiently before trial that settlement resulting from the process need not occur on the proverbial courthouse steps. However, where courts do not routinely require a pretrial order or exempt certain cases from pretrial order requirements, the approach of Proposed Amended Rule 26(a)(3) is a good one.

Rule 26(c) (Required Conference with the Adversary)

The Committee endorses the "meet and confer" concept as presented in Proposed Amended Rule 26(c) since it provides that a good faith attempt to confer may be sufficient to permit a motion for a protective order. This change from the March 1991 Draft of this proposal avoids possible pitfalls of a Rule that required the conference to take place even in the face of an uncooperative opponent.

Rule 26(e) (Supplementation)

If the Advisory Committee promulgates a disclosure mechanism along the lines of the August Draft, the Committee views the supplementation language of Proposed Rule 26(e) as apt. However, a minority of the Committee believes that Proposed Rule 26(e)(1) may lead to problematic, overbroad interpretation by requiring supplementation when an earlier disclosure is "not complete," a relatively open term.

Proposed Deletion of Rule 26(f) Discovery Conference.

To the extent that the Advisory Committee relocates the requirements of current Rule 26(f) to Rule 16 as also proposed in the current package of Proposed Amended Rules, it is appropriate to delete Rule 26(f). However, Proposed Amended Rule 16 does not sufficiently incorporate what we regard as the useful portions of current Rule 26(f). The Committee strongly supports early and mandatory discovery conferences. As indicated in the Committee's own proposals later in this comment, we believe the early appraisal by a judicial officer provides the surest and least costly means, (in the aggregate) for reducing excessive or abusive discovery practice. Consequently, the Committee suggests that Proposed Rule 16(c)(6) be expanded to require the court to consider making Rule 26(f) discovery rulings as part of the mandatory Rule 16 initial pretrial conference. At this juncture, the court should be directed to consider making an initial decision regarding possible areas of discovery dispute such as the appropriateness of a presumptive number of depositions and interrogatory limits. Admittedly, there may be instances in which it is premature to make certain discovery rulings in a Rule 16(b) pretrial conference. Sufficient information may not yet be available. In such instances, however, the court could make an initial decision, expressly subject to alteration or amendment at a subsequent pretrial conference.

Rule 30(b)

The Committee endorses both the approach and text of Proposed Amended Rule 30(b) (and its companion in Proposed Amended Rule 32(c)) concerning alternative recording of depositions.

Rule 30(c)

The proposed amendment is apparently designed to prevent the exclusion of witnesses at a trial deposition pursuant to Fed.R.Evid. 615, which many courts have applied to depositions. The Committee believes that Evidence Rule 615 should apply to depositions, at least where the deposition is designed for use at trial subject, of course, to the exceptions provided in Rule 615 for parties who are natural persons, designated party representatives, or persons "essential to the presentation of the party's cause," a term we construe to permit an expert to attend the opposing expert's trial deposition.

Rules 30(a)(2); 30(d); 33 (Deposition and Interrogatory Limits)

The discovery amendments propose, absent leave of court, a presumptive limit of 10 depositions, apparently including named parties and experts.¹⁴ In addition, direct examination of the deponent is to be limited to a presumptive period of six hours, reduced from the March Draft's presumptive limit of eight hours.

The Committee, although very concerned about controlling excessive discovery, opposes fixed presumptive limits on depositions and interrogatories. The Committee believes such limits, if appropriate in the individual case, should be established by a judicial officer at the initial Rule 16 pretrial conference or a Rule 26(f) discovery conference. The Committee believes that any limitations on amount or duration of discovery, particularly the time for conducting depositions, are doomed to failure. A minority of the Committee, however, see limits on number and duration as a useful benchmark for assisting courts in establishing an implicit definition of what constitutes "normal" or "excessive" discovery.¹⁵ The Committee as a whole agreed,

¹⁴ Proposed Rule 30 also requires leave for a second deposition of a previously deposed witness, a prisoner's deposition, or a deposition within two weeks of a Rule 12 motion. The Committee generally endorses these changes.

¹⁵ The Committee believes that presumptive limits will prove either excessive or inadequate depending on the case and merely increase discovery motion practice and the de facto power of the district court over case outcomes since few trial court rulings regarding discovery limits can receive meaningful appellate review.

however, that should limits be enacted, the limits proposed are too low. The Committee is concerned that the 6-hour duration limit is too short and may pose burdensome restrictions. The entire Committee continues to have reservations about the 10-deposition limit and the 15-interrogatory limit as well as the concept of codified limits in general.

As indicated in the Committee's previous comments, we believe there should be an exception to the deposition limits for party-affiliated deponents with significant knowledge of the subject matter of the dispute. Defense counsel may wish, for example, to depose six high-ranking executives from the plaintiff corporation. Although all six are essentially parts of the same corporate defendant, taking these six depositions would leave counsel with only four more depositions that could be taken as a matter of right. Under these circumstances, it would be unwise for the rule to require defense counsel to expend resources seeking leave of court to depose these executives should the plaintiff's lawyer be unwilling to deal in good faith on the issue of deposition quantity. To avoid such unfortunate but not farfetched scenarios, the Committee continues to believe that there should be no presumptive limit on depositions, particularly for party employees or agents who are significantly involved in the dispute under litigation.

The Committee, with some dissent, opposes limits on the duration of depositions. First, this portion of the August Draft, combined with the other limiting proposals, begins to look uncomfortably like a gigantic local rule. Second, limits tend to encourage either of two unfortunate judicial responses: (a) the parties routinely seek and obtain leave of court to conduct additional discovery, in which case the limits accomplish little; or (b) the court grants further discovery only rarely, making it difficult for parties (particularly claimants) to develop a case (particularly when the opponent has greater access to information). Third, number and duration limits substantially shift the factor of inertia in favor of discovery resisters and against discovery seekers. Absent a firmer empirical foundation for viewing excessive discovery as the greater abuse than discovery obstruction, the Committee sees no reason for such a substantial shift.³⁶ The limits of the Proposed Rules hold potential both to

Those endorsing some limits appreciate this danger but believe that the expense and delay of modern litigation require some effort to reduce unnecessary discovery and that benchmark limits will serve to guide counsel and the court in reaching reasonable accommodations with a minimum of satellite litigation.

³⁶ Limited empirical examination to date suggests that discovery resisters are at least as likely to engage in unreasonable conduct as are discovery seekers. See, J. Ebersole

raise transaction costs for all litigants without corresponding gain in other aspects of efficiency and to affect disproportionately different classes of litigants.

The number and duration of limits might well, of course, motivate counsel to cooperate more closely, negotiating different arrangements pursuant to Fed. R. Civ. P. 29, but at substantial cost and uncertainty if the limits are unrealistically low. Especially during the early years of the Proposed Rules, counsel resisting discovery would have some incentive to "gamble" and "wait-and-see" whether the local bench will prove one that routinely grants leave for further discovery or routinely denies requests for leave. Where either approach obtains in the extreme, counsel familiar with such local habits will have very little incentive to negotiate in good faith where they perceive themselves as favored by the court's approach to the discovery limits.¹⁸

If limits are to be placed on interrogatories, the limit of 15 seems too low. The Draft Committee Note observes that the proposed limits stem from successful use of interrogatory limits by local rule. However, all local rules of which the Committee is aware presumptively permit at least 20 interrogatories, with some districts setting a presumptive limit of 50 interrogatories. Although the local rules limiting interrogatories appear to have worked well and are generally supported by the bar,¹⁹ some counsel

& B. Burke, Discovery Problems in Civil Cases (FJC 1980).

¹⁷ See Parklane Hosiery v. Shore, 439 U.S. 322 (1978) (criticizing tendency of former issue preclusion rules to encourage litigants to "wait-and-see" before pursuing dispute resolution in hopes of taking advantage of asymmetric rules of preclusion).

¹⁸ Where the limit is artificially low this will encourage more motion practice before the court (negating some of the efficiency gains sought through the discovery amendments), resulting in more reported opinions or general knowledge in the legal community regarding which judges are discovery "conservatives" and which are discovery "liberals."

The low limit thus ultimately will improve practitioner knowledge and remove some of the incentive to negotiate that comes from uncertainty of outcome. Because so few discovery motions see appellate review, knowledge of judicial behavior could be quite localized and idiosyncratic (e.g., a single federal judge for the rural portion of a state).

¹⁹ See J. Shapard & C. Seron, Attorneys' Views of Local Rules Limiting Interrogatories 11-15 (FJC 1986). This study surveyed counsel in 12 districts with local rule interrogatory limits ranging between 20 and 50. Approximately two-thirds of the respondents found limits worthwhile and stated that they were

have argued that the limitations often create additional litigation expense and disadvantage parties of modest resources, for whom interrogatories are an effective tool in lieu of more expensive depositions.⁴⁰ It is not at all certain that the bar will support an interrogatory limit as low as 15.⁴¹

By invoking the local rules experience to support interrogatory limitation but proposing a rule limiting interrogatories to approximately half the limit generally utilized in local rules (30 interrogatories is a common local rule), the Advisory Committee appears to be following a strategy of "if 2 is good, 1 is better." If the interrogatory limits are codified into the federal rules, the more appropriate figure is one already used with success in districts with local rules: we suggest 25 or 30. Should this figure prove too large, subsequent amendments can reduce the presumptive limit.

The Advisory Committee Note states that because Rule 26(a)(1)-(3) requires disclosure of much of the information previously obtained by interrogatories, there should be less occasion to use this form of discovery and the limit is therefore justified. Until, however, empirical data proves disclosure to be an effective

content not to change the rule, with approximately 10 percent of the respondents advocating elimination of interrogatory limits. Perhaps significantly, half of the attorneys favoring interrogatory limits supported this revision when accomplished by local rule but not when codified in the Federal Rules.

⁴⁰ Additional expense can occur where parties must frequently seek leave of court to propound more interrogatories. Because attorneys in many districts with interrogatory limits appear to be able frequently to increase their use of interrogatories through stipulation, this danger can be minimized through cooperation of counsel. However, such stipulations can also be interpreted as indicating that the limits of the local rules are unrealistically low. For example, the Shapard & Seron study found that a substantial percentage (40 percent) of attorneys in districts with a 20 interrogatory limit exceeded the limit, either by stipulation or leave of court, although the sample size was small and some methodological quirks may account for this figure. *Id.* at 19. Regardless of the district's limit, comparatively few attorneys use more than 30 interrogatories. *Id.* at 19.

⁴¹ One danger of limits is the tendency of counsel to avoid clear, tabular format interrogatories with subparts as these will "count" as more than one interrogatory. Consequently, interrogatory limits may tend to produce lengthy, harder to understand questions. *Id.*

and cost-efficient discovery mechanism, the 15-interrogatory limit may be too restrictive.

If restrictions on interrogatories are imposed in the Federal Rules, the Committee recommends a model more akin to Local Rule of Civil Procedure 46 of the Southern District of New York, a copy of which is attached as Appendix B to this submission. Local Rule 46 permits early use of interrogatories but "restricted to those seeking names of witnesses [with relevant knowledge] and the existence, custodian, location and general description of relevant documents, including pertinent insurance agreements and other physical evidence, or information of a similar nature." Although this is similar in intent to Proposed Rule 26 regarding disclosure, the Southern District approach has the virtue of retaining the existing discovery mechanism without requiring a new procedure. Local Rule 46 thereafter forbids use of interrogatories during discovery unless "they are a more practical method of obtaining the information sought than a request for production or a deposition." At the close of discovery, Local Rule 46 permits the parties to serve expert¹² and "contention" interrogatories unless otherwise ordered by the court, placing the burden of seeking judicial intervention on the parties resisting discovery. The Committee has found Local Rule 46 both feasible and fair in practice that it has reduced excessive use of interrogatories and generally lowered discovery costs.¹³

We believe that the more reasonable restrictions upon the taking and duration of discovery which we suggest would better preserve the balance of burdens between those seeking discovery and those resisting it than do the Proposed Amended Rules. Although "discovery abuse" has long been a part of the lawyer's lexicon, no one has demonstrated that discovery abuse is the "fault" of a particular class of litigants. However, most blame tends to fall upon claimants, who more often seek discovery as part of their task for making a case and shouldering the burden of persuasion.

¹² Expert interrogatories would be unnecessary upon adaptation of the portions of the November Draft liberalizing access to expert witness information.

¹³ Local Rule 46 also specifically requires what many attorneys already know to be required by professionalism: that objections to a portion of a discovery request do not obviate the duty to respond to legitimate discovery; that assertions of privilege require disclosure of basic information supporting the contentions of privilege; and that production of documents in lieu of answering an interrogatory not be so haphazard that the discovering party is forced to organize the materials. See Local Rule 46(d)-(f). The Committee has also found these requirements to be useful.

Although this generalization is perhaps accurate (*i.e.*, claimants want more discovery) it does not logically follow that claimants are the source of discovery abuse. Abuse can also involve the wrongful withholding of information. Whether described as a "fishing expedition" or "stonewalling," the Committee regards discovery abuse as a two-way street. We caution care in shifting the economic, logistical, and tactical burden of going to court too greatly through the Proposed Rules. With such relatively low limits on depositions and interrogatories, the Proposed Amended Rules place too much of the burden of discovery reform on the discoverers and not enough upon the resisters.

Regarding local variation, the Committee agrees with the provisions of Proposed Rule 26(b)(2) permitting local rules to alter presumptive limits on the number and length of depositions and number of interrogatories "for particular types or classifications of cases" but believes the local "opt out" provision should be altered to provide that a district court can not set lower limits than those stated in any amended rules and to permit district courts to increase presumptive limits in all cases, not merely particular classes of cases. Despite this Committee's general resistance to significant geographic variation in civil practice, it believes that greater local discretion to expand presumptive discovery worthwhile, largely because the Committee sees excessive contraction of discovery rights as a greater danger than excessive local variation in discovery practice.

An Alternative Potential Avenue of Discovery Reform. In lieu of changes in the discovery rules or mechanism, the Committee recommends institutionalization of a more active judicial role in supervising discovery disputes. This is particularly consistent with the Civil Justice Reform Act, which recognizes that effective delay and cost reduction requires "early involvement of a judicial officer in planning the progress of a case, controlling the discovery process, and scheduling" the litigation (136 Cong. Rec. S17904 (daily ed. Oct. 27, 1990)). More active early judicial involvement offers a more pragmatic solution to the discovery dilemma. The Rule 16(b) conference already provides a vehicle for judicial supervision. The Proposed Amended Rule 16 would add greater authority to the court in this regard."

" The notion of early and substantial judicial involvement as the best means of curbing litigation excuses is nothing new. The major FJC study published in 1978 found this to be the most effective means of controlling discovery without detracting from any of the substantive rights of the parties. See Connolly, supra note 25, at 77-84. In addition, this study proposed that all discovery be held to a presumptive deadline of no more than six months. The Committee endorses this approach.

The Committee endorses strengthening this mechanism. Instead of the disclosure provisions, "regular" party-initiated discovery should be available for litigants to pursue baseline information. At the initial pretrial conference, the judge or magistrate presiding at the conference would obtain more information from the parties and set forth a more detailed discovery plan (as well as ruling on any discovery disputes resulting to date). This more detailed pretrial discovery conference could perhaps adjudicate issues of privilege and relevance likely to arise during discovery (and already foreshadowed by initial discovery efforts). In addition, the Advisory Committee should consider mandating that counsel meet prior to the first pretrial conference and attempt to agree upon discovery matters. Local Rule 6 of the Central District of California (attached as Appendix C) requires such a mandatory attorneys conference as well as a resulting status report to the court. Although the bar was predictably concerned when this rule was initiated, it appears to have worked well and been accepted by the local bar.

Under the Committee's proposed approach, each case would in effect, get a custom-made discovery limit from a judicial officer, who would make an early assessment of the relative need for discovery based on counsel's showing derived from baseline discovery. This would undoubtedly require more pretrial judicial assessment of the case and, as a practical matter, would probably require an expanded corps of magistrate judges or Article I "discovery masters". Although this entails some cost, protracted discovery administered largely by counsel can be far more costly. By the same token, undue restriction of discovery that harms certain litigants or claims carries costs of its own. As discussed above, overly stringent presumptive limits on discovery may both discriminate against certain litigants and raise litigation costs through the increase of satellite motion practice. The Committee thus proposes early party-controlled baseline discovery followed by a more searching evaluation of the discovery needs of the case at the initial pretrial conference.

Rule 43

The Committee strongly opposes Proposed Amended Rule 43, which provides for judicial discretion to require that direct witness testimony be introduced by affidavit or deposition but that these written submissions be "[s]ubject to the right of cross-examination". This provision is both extremely unwise and most unlikely to lead to any discernible benefit that could possibly offset its obvious disadvantages. No amount of tinkering can rehabilitate this flawed proposal. It should be withdrawn immediately.

The Anglo-American legal tradition has historically placed important emphasis on live courtroom proceedings for obvious

reasons. Although it may take longer than a well-crafted written presentation, the give-and-take of live testimony, with objections, colloquy, interruptions from the bench, cross and re-direct all provide both information in the abstract and, more important, information in context for the court. Most important, the testimony comes from the witness rather than the lawyer who drafted the affidavit or witness statement. These advantages of taking evidence "in living color" rather than in writing more than outweigh the additional time required for traditional trials. Although "demeanor" evidence can be overrated, it should not be eliminated altogether. Demeanor evidence provides an important component of the whole picture of a dispute.

The Committee concurs in and echoes the comments of Frank et al. regarding Proposed Amended Rule 43. If written direct testimony is required in bench trials, there is little logical stopping point to prevent future attempts at written cross-examination, or written testimony in jury trials. The logical point of demarcation is the trial process itself. Trial witnesses should be oral witnesses unless the parties agree to the introduction of written testimony. Judges should not be empowered to "streamline" the trial against the wishes of the litigants and advocates in the face of centuries of historical vindication of oral trial proceedings.

Rules 54 and 58

Although we agree with some of the proposed revisions of Rules 54 and 58, we feel that the changes do not go far enough and should be adjusted in order to promote judicial economy and ease the proposed time burden being placed on practitioners.

Given the predisposition of most courts and commentators to have appeals courts resolve the issues regarding requests for attorneys' fees in conjunction with all the other issues being appealed in the case, Rule 54 should be changed to require that a motion for attorneys' fees renders an otherwise final judgment nonappealable until the district court disposes of the attorneys' fees motion, unless (i) the district court enters a separate judgment under Rule 54(b), (ii) certification under 28 U.S.C. § 1292(b) is obtained or (iii) appellate review is obtained via mandamus.

Implementing this change would not only promote judicial economy but would also eliminate doubt about when a notice of appeal must be filed if the issue of attorneys' fees is lurking. A notice of appeal would then be effective unless a fees motion is filed. In addition, the Committee's proposal is consistent with Proposed Amended Fed. R. App. P. 4(a)(4), which would also treat motions for counsel fees as vitiating the notice of appeal and in essence place the appeal on hold.

The Committee's proposed change would also eliminate the purpose behind the Advisory Committee's 14-day provision in Rule 54(d)(2)(B). The Draft Committee Note suggests that the purpose of the short time limit is to ensure that opposing parties are informed of the attorneys' fees claim before the time for appeal has elapsed.⁴⁵ This objective is automatically met if a pending application for fees prevents final judgment and piecemeal review.

A time limit for filing the motion for attorneys' fees would still be necessary in order to avoid long delays in the appeals process, as all appeal issues in the case would be awaiting the district court's resolution of the attorneys' fees motion. However, because, as a practical matter, billing data, generally in the form of computer printouts, are often not available so soon after entry of judgment, and in a complex case might not be able to be redacted to eliminate privileged material and/or analyzed satisfactorily within 14 days, we believe that the filing deadline for fees motions should be set at 21 days after entry of judgment.

At the very least, if the 14-day limit is retained, the text of the revised Rule 54(d)(2)(B) should be changed to add the language of the Draft Committee Note⁴⁶ that the party moving for attorneys' fees need not support the motion with print-outs or other evidentiary material at the time of the filing of the motion, but must be prepared to provide such support according to whatever schedule the district court may set in light of the circumstances of the case. Without such additional language in the text of the rule, we conclude that practitioners will be unfairly forced to make unduly rushed decisions regarding supporting papers for fees motions.

In addition, the Committee is concerned about the growing practice of routinely assigning special masters to decide fee applications. Unless hard-pressed to render timely considered fee decisions, courts should generally attempt to decide fee petitions with full-time judicial personnel. The Committee generally endorses fee schedules by local rule, provided that the court obtains the views of a wide spectrum of the practicing bar prior to formulating such fee schedules. In addition, the Advisory Committee may need to consider specific language authorizing interim fee awards in civil rights cases or other appropriate situations.

Rule 56

⁴⁵ 938 F.2d at CCXXXV.

⁴⁶ 938 F.2d at CCXXXVI.

Overall, the proposed revised Rule 56 is long, cumbersome and unnecessarily burdensome in its requirements for both bench and bar.⁴⁷ The present rule, along with the cases establishing the standards for evaluating summary judgment motions and local rules specifying various procedural requirements,⁴⁸ affords enough protection for litigants and enough direction for the courts. By trying to incorporate into the proposed rule some of the standards articulated in the governing case law, the Advisory Committee has conspicuously omitted other governing standards and leaves counsel wondering whether the proposed rule represents "one-stop shopping" on summary judgment standards."

⁴⁷ Not surprisingly, we are not the only lawyers with this reaction. See, e.g., Frank et al., supra note 5, at 16 (noting that Proposed Amended Rule 56 is more than 50 percent longer than current Rule 56 and creates "endless possibilities of further litigation, and to no apparent good end").

⁴⁸ See, e.g., N.Y. Southern and Eastern District Court Civil Rule 3(g), covering the issues addressed in proposed revised Rule 56(c)(1) and (2).

⁴⁹ For example, while the Advisory Committee Notes acknowledge the influence of Celotex Corp. v. Catrett, 477 U.S. 317 (1986), and Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), no mention is made of Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986), which stated that, even if certain genuine issues of material fact are outstanding, summary judgment may nevertheless be appropriate if the factual context renders the opposing party's claim "implausible."

We do not suggest that language reflecting the holding of this case be incorporated into any revised Rule 56. On the contrary, we have strong reservations about automatically codifying language from the controversial Matsushita and Liberty Lobby decisions. Rather, we view it as misleading to incorporate the holdings of certain Supreme Court cases without considering the entire body of summary judgment case law. Under the circumstances, we believe it would be best to leave the rule as it is and let counsel familiarize themselves with all appropriate cases on summary judgment.

For example, Liberty Lobby's decision to incorporate the substantive burden of proof into summary judgment analysis may, as then-Judge Scalia noted in the D.C. Circuit's panel opinion in the case, put judges inappropriately in the role of weighing evidence in jury cases. However, it appears that courts have not vigorously applied this aspect of Liberty Lobby, probably because deciding summary judgment motions "filtered through the prism of the substantive burden of proof at trial" is unworkable in many cases. In addition, it has a certain standardless "I know it when I see it" quality of adjudication by instinctive reaction. Certain unfortunate language in Liberty Lobby can also be read as intruding

This is not to say that Rule 56 could not be improved in any way. Portions of the proposed revised rule seem reasonable, such as affording opposing parties 30 days to respond to a motion. But, where needed, the same effect is generally achieved through counsel's extending their adversaries' time to respond; and sometimes, in simple, straightforward cases, 30 days may be too much time.

The proposed revised rule also appears to favor unduly those litigants who might wish to delay summary judgment with unproductive and wasteful discovery. In the proposed revision of subdivision (c), the parties opposing a motion for summary judgment must be "afforded a reasonable opportunity to discover relevant evidence pertinent [to the motion] that is not in their possession or under their control." This clause is likely to serve as a costly and obstructive lifeline--however temporary--to delay the inevitable judgment against litigants who have no legitimate basis for opposing summary judgment. Current Rule 56 affords an opportunity for discovery if the court sees fit, but it does not do so in the manner presented by the proposed revision of subdivision (c)--presumptively requiring the opportunity for such discovery. There are numerous uncomplicated cases with respect to which summary judgment is an appropriate mechanism to dispose of the case quickly and efficiently. To place an artificial roadblock in the path of such an otherwise efficient mechanism will only further tax an already overburdened federal judiciary.

While Rule 11 protections still exist to counter certain frivolous defensive measures, Proposed Amended Rule 56 has removed the threat of monetary sanctions currently found in subdivision (g) of Rule 56 when affidavits are submitted in bad faith or solely for delay. Although the Draft Committee Note maintains⁵⁰ that the protections of current Rule 56(g) are contained in Proposed Amended Rule 11, the final shape of Rule 11 remains uncertain in view of the controversy surrounding the Rule. Although we generally endorse consolidation of sanctions rules, final deletion of other sanctions rules should occur only after Rule 11 revisions or the institution of an omnibus rule are finalized.

on the traditional role of the jury. In our view, courts should resist these potential problems by exercising restraint in the application of Liberty Lobby and Matsushita and have done so informally and admirably in the five years following the Court's 1986 trilogy. A revamped summary judgment rule may well disturb the judicial balance that currently appears to prevail regarding summary judgment.

⁵⁰ 938 F.2d at CCXLVIII.

Consistent with its May 1991 Comments regarding proposed changes in federal discovery practice, the Committee remains puzzled regarding the attitude toward experimentation apparently prevailing in the Advisory and Rules Committees. Ordinarily, when one enters a period of experimentation, one retains a control group (a body unchanged from the status quo) and an experimental group or groups (bodies different than the status quo). After an adequate time, the control group and the experimental group are compared, allowing the researcher to determine what impact, if any, was had by the experimental group's differences from the status quo.

The Civil Justice Reform Act of 1990⁵¹ embodies the essence of the experimental method in that it requires each federal judicial district to convene advisory groups to suggest means by which the court may reduce delay and cost of litigation. These groups are already in place throughout the country. Both the Southern District and Eastern District of New York have already promulgated extensive advisory group reports and are expected to adopt a number of substantial changes in civil practice by local rule. For example, the Eastern District appears likely to adopt in most respects the disclosure procedures contained in the Proposed Amended Civil Rules. By 1995, these and other district plans will have been implemented and reported upon to the Judicial Conference of the United States. At that juncture, courts can more precisely gauge the potential effectiveness of proposed amendments such as the disclosure system, limitations on depositions and interrogatories, expanded pretrial conferences and the like. For that reason, the Committee has strongly opposed major amendments to the discovery rules at this time.

Proposed Amended Rule 83 continues to suggest that the Advisory Committee has turned the scientific method on its head. Rather than maintain some semblance of the status quo as a control group, the far-reaching August 1991 package of proposed amendments drastically changes much of the civil rules, in effect making the nation's federal courts an experimental group. Proposed Amended Rule 83 would permit, contingent upon Judicial Conference approval, district courts to adopt experimental local rules inconsistent with the overall rules and Title 28 for a period of up to five years. In effect, new Rule 83 would allow some districts to become different experimental groups or revert to the former civil rules. Of course, predicting any of this is impossible because the Judicial Conference has published no substantive criteria by which it will decide the applications of the district courts.

The Committee is at a loss to understand the rationale underlying both the sudden and widespread revision of the discovery rules combined with the strange reverse experimentalism embodied in Proposed Amended Rule 83(b). If the Judicial Conference favors

⁵¹ 28 U.S.C. §471 (1990).

The Committee is at a loss to understand the rationale underlying both the sudden and widespread revision of the discovery rules combined with the strange reverse experimentalism embodied in Proposed Amended Rule 83(b). If the Judicial Conference favors experimentation, as does Congress by virtue of its passage of the Civil Justice Reform Act, it would seem wiser to retain the status quo and to permit districts to experiment (pursuant to the directives of the Act) without the need for Judicial Conference approval so long as any resulting local rules are not so inconsistent with the federal rules as to undermine a party's rights. Under the Proposed Amended Rules, there will be no organized experiment that can be studied--the Proposals effectively wipe out the control group and replace it with a nationwide experimental group. If these Proposals take effect, the Civil Justice Reform Act will have been effectively overruled.⁵² However, subject to the unarticulated discretion of the Judicial Conference, there remains the possibility of sporadic experimentation or a return to the status quo.

This arrangement appears to be a prescription for confusion with no likelihood of providing the profession with meaningful information as to the impact of various rules. Instead of making such broad revisions in the civil rules and so expanding Rule 83, we recommend restraint in rulemaking and oppose Proposed Rule 83(b) in any form.

The Committee endorses Proposed Amended Rule 83(d). Widespread and surprising variance in the ever-expanding local rules is a problem that can occasionally plague even the most careful counsel. We also suggests that the draft Rule 83(d) language be revised to state specifically that it applies to standing orders and unwritten customary procedures of the district courts.

Evidence Rule 702

Subject to its concerns regarding the proposed revisions in discovery practice and the premature institution of the disclosure

⁵² However, because of the inherent delays in rulemaking, the August 1991 Proposed Amended Rules could probably not take effect until December 1, 1993 at the earliest. Thus, the experimentation sought by Congress in 28 U.S.C. §471 could be realized for at least some short period of time. In addition, the August 1991 proposals can not become law without the acquiescence of Congress. Notwithstanding that, it seems counter to the 1990 Act for the Rules and Advisory Committee to move so swiftly toward a major revision of Rules, particularly the discovery rules, before the submission of the district studies required by the 1990 Act.

system, the Committee supports Proposed Amended Rule of Evidence 702.

The Committee and the Association of the Bar appreciate the opportunity to submit comments regarding these imported proposed revisions to the civil rules. We would be happy to provide additional explanation, commentary, or research should the Rules Committee or Advisory Committee desire.

Respectfully,

Jeffrey A. Mishkin, Chair
Committee on Federal Courts
Association of the Bar of the
City of New York

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cc: Hon. Sam Pointer
Prof. Paul Carrington

APPENDIX A.--COMMITTEE ON FEDERAL COURTS

RULE 11

*[Draft]*Rule 11. Abusive Conduct of Litigation³⁸*(a) Definitions*

(1) "Conduct," as used in this Rule, refers to any activity by counsel, a party, a witness, or anyone else attempting to influence litigation that affects the proceedings of a case properly before the court. Conduct includes but is not limited to the commencement of an action, informal investigation or the absence of it surrounding the prosecution or defense of an action, the use of a pleading, motion, or other paper, settlement discussions, discovery practice, motion practice, dealings among parties, counsel, and witnesses, as well as behavior surrounding the trial of a matter.

(2) "Abusive" conduct³⁹ is conduct undertaken or omitted, including both intentional acts and omissions, as well as reckless or grossly negligent behavior. Examples of abusive conduct include seeking unreasonable delay in the conduct and resolution of the matter, harassment of others, attempting to inflict malicious injury to others, a grossly negligent or reckless failure to conduct a reasonable inquiry into the facts or applicable law of a matter, or engaging in any other behavior that falls demonstrably short of that expected from a reasonable attor-

³⁸ Owing to time constraints, the Committee was not able to draft an advisory note to accompany its proposed comprehensive sanctions rule. An accompanying note would obviously add much to the new rule by permitting the Advisory Committee to give guidance to the profession as to the Rule's application without making the text of the rule unduly long and unwieldy. Obviously, a well-crafted note would alleviate the pressure which this Committee felt to make its draft comprehensive rule very specific.

³⁹ Although a Note would generally aid drafting and use of the entire comprehensive sanctions rule, it would have particular value for this subsection. Defining abusive conduct is an elusive goal. Through illustrations, examples and narrative, the note can more fully communicate the intent of the new rule.

This segment of the Rule seeks to establish a broad standard that judges would apply with sensitive discretion to sanction obvious volitional abuses and attorney behavior that, although not intentionally abusive, is so grossly or recklessly below acceptable standards of attorney behavior as to amount to an abuse of the litigation process.

The Note would stress that the new rule is designed to focus on the conduct of counsel rather than the product of counsel. The court would be counseled to resist any tendency to sanction counsel merely because the court was displeased with counsel's analysis of the strength of the client's factual or legal position.

nev. In determining whether abusive conduct has occurred, the court may reach conclusions based upon circumstantial evidence of the behavior, performance, and motives of counsel and the litigants in the context of the dispute.⁵⁹ In addition, it shall constitute abusive conduct for counsel to make a legal claim, defense, contention, or argument that is utterly frivolous. A claim, defense, contention or argument is utterly frivolous when the assertion has no colorable or plausible basis and is unsupported by precedent, logic, or rational argumentation. A court should not sanction a legal claim made with a good faith basis for the extension, modification, or reversal of existing law. In assessing whether a legal assertion is utterly frivolous, a court should consider whether it has any support in the legal profession. In assessing the reasonableness of counsel's conduct, particularly investigations of fact and law, the court shall take due regard for the resources available to the parties and counsel, the magnitude of the litigation, and other constraints bearing upon the matter in question.⁶¹

(b) Sanctions Imposed for Abusive Conduct

Upon the finding of abusive conduct, the court may impose upon the offending person an appropriate sanction, which may include a fine, a reprimand, censure, referral to disciplinary authorities, mandatory continuing legal education, an order precluding the introduction of certain evidence, an order

⁵⁹ To some extent, of course, the "gross negligence" and the "recklessness" standard are different. The distinction between them and the selection of the apt verbal formula has traditionally perplexed the Supreme Court in litigation under 42 U.S.C. § 1983. The Committee is also uncertain at this time as to the apt standard to trigger sanctions and has included both terms in the draft rule to facilitate the Advisory Committee's assessment of the matter.

⁶¹ This sentence is intended to reduce any tendency of a court to require small firms, public interest firms, and *pro se* litigants to meet the level of practice found in the largest and most sophisticated urban law firms. Although the new rule should not immunize the reckless or wilful misconduct of small firms or lawyers representing clients of limited resources, these factors should be considered by the court in determining how much fact investigation and legal research was enough. For example, in a small case (e.g., a low damage claim arising out of copyright infringement), the parties can not reasonably be expected to invest great resources in pre-complaint or pre-answer investigation. Similarly, in such a case non-wilful errors by counsel are unlikely to visit great harm to the opposing party or counsel.

precluding the litigation of certain issues, an order precluding the litigation of certain claims and defenses, entry of default judgment, dismissal of the action, injunctive relief limiting the offender's future access to the courts, an order to pay to injured persons financial compensation such as expenses and counsel fees reasonably incurred because of the abusive conduct or any other sanction the court, in its discretion, finds appropriate. The court shall apply the least severe sanction capable of effecting the purpose of this rule. In awarding sanctions under this rule, the court shall give due regard to applicable sanctions provisions found in federal or state substantive law relevant to the merits of the case.

(c) Procedure

Prior to determining the existence of abusive conduct and determining an apt sanction, the court shall provide adequate notice to the potentially affected persons and hold an evidentiary hearing, at which time interested persons shall be permitted to be heard by the court. After hearing, the court shall render a written decision or decision reducible to writing that sets forth the court's findings and reasoning relevant to the determination of abusive conduct and sanctions. Where the court finds no abusive conduct, the court's decision may be suitably brief. Courts shall neither make findings of abusive conduct nor award sanctions without giving notice to the affected persons. Litigants who believe they have been victimized by frivolous conduct shall raise the issue, by motion or otherwise, at the earliest practicable opportunity. The court may, and ordinarily will, reserve decision on any question of abusive conduct until completion of the litigation in order that the allegedly abusive conduct can be placed in its apt context or mitigated.

(d) Scope

This Rule is intended to apply to all abusive conduct in

litigation and is not limited to the making of unwarranted claims or the commencement of litigation.⁶²

(e) Vicarious Liability

A principal is presumptively liable for the abusive conduct of its agent where the agent commits the abusive conduct within the scope of his or her authorized agency. This presumption may be rebutted where the facts in question show, by clear and convincing evidence, that the principal took all reasonable steps to prevent the abusive conduct and that the agent's actions were unauthorized and unexpected.

(f) Review

A district court's application of this rule shall be reviewed for abuse of the court's discretion. However, the level of scrutiny under the abuse of discretion standard shall vary on a sliding scale according to the severity of the sanction under review. In addition, the adequacy of the court's record shall be assessed according to a sliding scale based on the nature of the conduct and sanction under review.⁶³

(g) Repeal

The following rules are repealed: 26(g); 37(b)(2)(E); 36(g).

November 1990

⁶² At this juncture, the note accompanying the new rule would provide that the comprehensive rule shall be applied equally by the courts to intimidation of witnesses, refusal to provide discovery, pursuit of excessive discovery, motion practice, trial practice, settlement conduct, examination of witnesses, making of affidavits, seeking sanctions, or any form of abusive conduct made in connection with litigation so long as the offending person and behavior are properly subject to the jurisdiction of the court.

⁶³ The Committee has substantial concern that it may be inappropriate for the federal civil rules governing trial courts to set forth a standard of review to be applied by federal appeals courts. Notwithstanding this problem of rule making legitimacy, the Committee holds the view that the abuse of discretion standard of review is apt and that it should be applied in a manner sensitive to the context of the sanctions, particularly the magnitude and impact of the sanctions. A large fine, major award of counsel fees, or a searing and widely publicized censure by the trial court should receive greater appellate scrutiny than a court's insistence that offending counsel attend a seminar on ERISA pre-emption of claims arising under state law.

APPENDIX B

SOUTHERN DISTRICT OF NEW YORK

Rule 46. Interrogatories (Southern District Only)

(a) At the commencement of discovery, interrogatories will be restricted to those seeking names of witnesses with knowledge or information relevant to the subject matter of the action, the computation of each category of damage alleged, and the existence, custodian, location and general description of relevant documents, including pertinent insurance agreements, and other physical evidence, or information of a similar nature.

(b) During discovery, interrogatories other than those seeking information described in paragraph (a), above may only be served if they are a more practical method of obtaining the information sought than a request for production or a deposition.

(c) At the conclusion of each party's discovery, and prior to the discovery cut-off date, interrogatories seeking the claims and contentions of the opposing party may be served unless the court has ordered otherwise. Questions seeking the names of expert witnesses and the substance of their opinions may also be served, if this information has not been previously obtained.

(d) No part of an interrogatory shall be left unanswered merely because an objection is interposed to another part of the interrogatory.

(e)(1) Where an objection is made to any interrogatory or sub-part thereof or to any document request under Fed.R.Civ.P. 34, the objection shall state with specificity all grounds. Any ground not stated in an objection within the time provided by the Federal Rules of Civil Procedure, or any extensions thereof, shall be waived.

(2) Where a claim of privilege is asserted in objecting to any interrogatory or document demand, or sub-part thereof, and an answer is not provided on the basis of such assertion,

(i) the attorney asserting the privilege shall in the objection to the interrogatory or document demand, or sub-part thereof, identify the nature of the privilege (including work product) which is being claimed and if the privilege is being asserted in connection with a claim or defense governed by state law, indicate the state's privilege rule being invoked; and

(ii) the following information shall be provided in the objection, unless divulgence of such information would cause disclosure of the allegedly privileged information:

(A) for documents: (1) the type of document; (2) general subject matter of the document; (3) the date of the document; (4) such other information as is sufficient to identify the document for a subpoena *duces tecum*, including, where appropriate, the author of the document, the addressee of the document, and, where not apparent, the relationship of the author and addressee to each other;

(B) for oral communications: (1) the name of the person making the communication and the names of persons present while the communication was made and, where not apparent, the relationship of the persons present to the person making the communication; (2) the date and place of communication; (3) the general subject matter of the communication.

(f) Whenever a party answers any interrogatory by reference to records from which the answer may be derived or ascertained, as permitted in Fed.R.Civ.P. 33(c):

(1) The specification of documents to be produced shall be in sufficient detail to permit the interrogating party to locate and identify the records and to ascertain the answer as readily as could the party from whom discovery is sought.

(2) The producing party shall make available any computerized information or summaries thereof that it either has, or can adduce by a relatively simple procedure, unless these materials are privileged or otherwise immune from discovery.

(3) The producing party shall provide any relevant compilations, abstracts or summaries in its custody or readily obtainable by it, unless these materials are privileged or otherwise immune from discovery.

(4) The documents shall be made available for inspection and copying within ten days after service of the answers to interrogatories or at a date agreed upon by the parties.

Cross References

Federal Rules of Civil Procedure, see 28 U.S.C.A.

APPENDIX C

CENTRAL DISTRICT OF CALIFORNIA

RULE 6. EARLY MEETING OF COUNSEL—REPORT TO COURT—STATUS CONFERENCE

6.1 Time of Early Meeting. Within twenty (20) days after service of the answer by the first answering defendant, and thereafter as each defendant answers, counsel for the parties shall meet in person for the purposes set forth below. Where there are multiple defendants, counsel for the plaintiff shall take all reasonable steps to schedule the meeting so counsel for all parties can attend. Where necessary in multi-defendant cases and upon a showing of good cause, counsel may apply for one (1) reasonable extension of time within which to hold the early meeting.

6.1.1 *Documents.* To exchange all documents then reasonably available to a party which are then contemplated to be used in support of the allegations of the pleading filed by the party. Documents later shown to be reasonably available to a party and not exchanged may be subject to exclusion at the time of trial.

6.1.2 *Discovery.* To exchange preliminary schedules of discovery.

6.1.3 *Other Evidence.* To exchange any other evidence then reasonably available to a party to obviate the filing of unnecessary discovery motions.

6.1.4 *List of Witnesses.* To exchange a list of witnesses then known to have knowledge of the facts supporting the material allegations of the pleading filed by the party. The parties will then be under a continuing obligation to advise the opposing party of other witnesses as they may become known.

6.1.5 *Settlement.* To discuss settlement of the action.

6.1.6 *Complicated Cases.* To discuss whether the action is sufficiently complicated so that all or part of the procedures of the Manual For Complex Litigation should be utilized. Counsel may propose to the Court modifications of the procedures in the Manual to facilitate the management of a particular action.

6.2 Report to Court. Within fourteen (14) days after the Early Meeting, those attending are mutually obligated to file a Joint Report of Early Meeting with the Court setting forth a preliminary schedule of discovery for each party; discussion of the likelihood of settlement; discussion of the likelihood of appearance of additional parties; a preliminary estimate of the time required for trial; and any other information which may be helpful to the Court in setting the case for Status Conference and/or the Pre-Trial Conference.

6.3 Notice of Requirement. Counsel for plaintiff shall be responsible for giving notice of the requirements of Local Rules 6.1 and 6.2 to counsel for each defendant as soon as possible after each defendant's first appearance.

6.4 Status Conference. The Court may place the action or proceeding on calendar for a Status Conference at a date no earlier than twenty (20) days after the Joint Report of Early Meeting is due to be filed with the Court. The court clerk shall give prompt notice to all parties who have then appeared of the date and time of such Status Conference and shall give like notice to all parties who subsequently appear prior to the date of such Status Conference.

6.4.1 *Representation at Conference.* Each party appearing at any Status Conference shall be represented by the attorney (or the party if pro se) who is then contemplated to have charge of the conduct of the trial on behalf of such party.

6.4.2 *Report for Conference.* At least ten (10) days before the date set for a Status Conference the parties are mutually required to file a Joint Status Report discussing the following:

State of discovery, including a description of completed discovery and detailed schedule of all further discovery then contemplated.

A discovery cut-off date.

A schedule of then contemplated law and motion matters.

Prospects for settlement.

A proposed date for the Pre-Trial Conference and the trial.

Any other issues affecting the status or management of the case.

APPENDIX 17.—LETTER FROM GREGORY K. ARENSON, ESQ.,
PROSKAUER, ROSE, GOETZ & MENDELSON (WITH ATTACHMENT),
TO HON. WILLIAM J. HUGHES, CHAIRMAN, JUNE 14, 1993

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June 14, 1993

VIA UPS

Honorable William J. Hughes, Chairman
Subcommittee on Intellectual
Property and Judicial Administration
Judiciary Committee
United States House of Representatives
207 Cannon, House Office Building
Washington, D.C. 20515-6219
Attn: Edward H. O'Connell, Esq., Assistant Counsel

Re: Proposed Amendments to the Federal
Rules of Civil Procedure

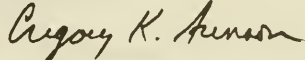
Honorable Sir:

On behalf of the Commercial and Federal Litigation Section of the New York State Bar Association, I am transmitting a copy of A Commentary on Proposed Changes to the Federal Rules Governing Discovery prepared by the Committee on Discovery of which I am chair. We ask that the Subcommittee make this report a part of the record of the hearing on the proposed amendments to the Federal Rules of Civil Procedure to be conducted on June 16, 1993.

While the views of this report are exclusively those of the Commercial and Federal Litigation Section and not of the New York State Bar Association, you will see that our Section has grave concerns with the proposed amendments concerning discovery, particularly the amendments regarding required initial disclosure, limitations on the number of interrogatories at depositions, and sanctions for failure to

supplement responses to discovery requests. Should you or anyone else on the Subcommittee have questions regarding the contents of this report, we will be happy to respond. Thank you for your consideration.

Very truly yours,



Gregory K. Arenson

GKA:sm
Enclosure

pc: P. Kevin Castel, Esq., Chair
Commercial and Federal Litigation Section

A COMMENTARY ON PROPOSED CHANGES TO
THE FEDERAL RULES GOVERNING DISCOVERY

Report of the Commercial and Federal Litigation Section of the
New York State Bar Association

On November 27, 1992, the Judicial Conference of the United States transmitted to the Supreme Court proposed amendments to the Federal Rules of Civil Procedure and Federal Rules of Evidence (the "Judicial Conference Proposal"). The Supreme Court has until May 1, 1993, to approve and promulgate these proposed amendments, and, if it does, then Congress has until December 1, 1993, to disapprove or modify them. The proposed amendments contain significant changes in the rules governing discovery* and are substantially modified from the proposed amendments circulated by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (the "Committee Proposal") on which this Section commented last year (the "Section Report").

The Judicial Conference Proposal has adopted a requirement that there be an initial discovery meeting among the parties to formulate a discovery plan, which is to be incorporated into a scheduling order of the court, whereas the Committee Proposal had eliminated the discovery conference. The Judicial Conference Proposal has narrowed the scope of required initial disclosure, but, as did the Committee Proposal, it shifts the

* This commentary does not discuss the changes in proposed Rule 26(a)(2) concerning the disclosure of expert testimony and in proposed Rule 26(a)(3) concerning pretrial disclosure.

burden for such disclosure to the party holding the information. While eliminating the Committee Proposal's limitation on the length of depositions and imposing a new standard for objections and directions not to answer during depositions, the Judicial Conference Proposal retained the Committee Proposal's presumptive limitation on the number of depositions and interrogatories. Although specifying the circumstances requiring supplementation of initial disclosure and responses to interrogatories, document requests and requests to admit more carefully than in the Committee Proposal, the Judicial Conference Proposal does not specify the time when such supplementation is required in a way that will avoid case-by-case disputes and does not modify the possible sanctions for failure to supplement in a manner that will discourage such collateral disputes.

While the Judicial Conference Proposal is an improvement over the Committee Proposal, it too is seriously flawed and should be rejected or substantially modified by the Supreme Court or Congress.

Required Discovery Meeting

Proposed Rule 26(f) of the Judicial Conference Proposal requires the parties who have appeared, by attorneys of record or representatives, to meet no later than the earlier of 76 days after the first appearance of a defendant or 106 days after service of the complaint on any defendant (that is, 14 days before a scheduling order must be filed by the court under proposed

revisions to Rule 16(b)) to discuss the nature of and basis for claims and defenses, to explore the possibility of settlement, to make or arrange required initial disclosure and to develop a proposed discovery plan. The discovery plan is to encompass the subjects for discovery and the timing of, form of and limitations on disclosure, including any variation from the federal or local rules. Within 10 days of the meeting, the parties are to submit a written report to the court outlining their proposals for and views on the discovery plan. The court is then to enter a scheduling order. Proposed Rule 16(b). Unless otherwise authorized or agreed, a party may not seek discovery from any source prior to the parties' discovery meeting. Proposed Rule 26(d).

The Section is pleased that the Judicial Conference appears to have adopted our suggestion in the Section Report that there be a required discovery meeting among the parties to develop a discovery plan before disclosure occurs. As long as the parties comply, we believe that this approach will promote constructive and productive cooperation among counsel and may avoid many discovery disputes and sanctions. In addition, such a meeting should narrow any discovery disputes to permit courts to address them more expeditiously and efficiently. The Section wishes to emphasize that the Judicial Conference Proposal permits the parties, with court approval, to vary the limitations in the federal or local rules, an important consideration in appropriate complex or particular types of cases.

Required Initial Disclosure

The Judicial Conference Proposal provides that, at or within 10 days of the discovery meeting, unless otherwise stipulated or directed by the court, certain required initial disclosures are to be made by each party. Proposed Rule 26(a)(1). The required initial disclosures include: (1) the name, and, if known, address and telephone number of each individual likely to have discoverable information "relevant to disputed facts alleged with particularity in the pleadings;" (2) a copy or description by category and location of all documents, data compilations and tangible things in a party's possession, custody or control that are "relevant to disputed facts alleged with particularity in the pleadings;" (3) a computation of any damages claimed by the disclosing party and documents or other evidentiary material not privileged or protected from disclosure on which the computation is based; and (4) any insurance agreements under which an insurer may be liable to indemnify or reimburse for payments made to satisfy any judgment. Proposed Rule 26(a)(1)(A) - (D). These disclosures are to be based on information "reasonably available" to the party making them. Proposed Rule 26(a)(1).

One of the most radical changes contained in the Judicial Conference Proposal is to shift the burden for initial disclosure from the party seeking the information to the party holding the information. The Section sees no clear need for this shift. We believe that in the routine cases there are already routine discovery requests that are propounded. However, in more complex

cases, discovery requests are not routine and must be tailored to the situation confronting the parties. The Section believes that the required discovery meeting is more appropriate and will suffice to narrow the issues and define the particularized scope of discovery without further requiring parties to provide their adversaries with information that has not been requested. We are further concerned that much wasteful collateral litigation will occur about whether appropriate initial disclosures were made, particularly in light of the possible draconian sanction under proposed Rule 37(c)(1) that the evidence be excluded from the case, unless the failure to disclose was harmless or with substantial justification. In sum, shifting the burden of initial disclosure does not obviously improve the existing system of disclosure and will likely lead to more litigation about the scope and content of any initial disclosure. The costs appear to outweigh any benefit.

We also believe that the adoption of a required initial disclosure system based upon a shifting of the burden of producing information is premature. Under the Judicial Improvements Act of 1990 and Title I of the Civil Justice Reform Act of 1990, several district courts, including the Southern District of New York and the Eastern District of New York, are experimenting with different forms of required initial disclosure. The Section suggests that radical change such as that in the Judicial Conference Proposal should await the results from these experiments.

The Section notes that the Judicial Conference Proposal has attempted to reduce the area for disputes over whether

appropriate initial disclosure has occurred. The Judicial Conference Proposal has limited the required initial disclosure to information that is "reasonably available," a standard that, because it is fact specific, may easily lead to disputes as to its application.

We are pleased that the Judicial Conference Proposal has recognized the difficulties inherent in requiring a party to determine the issues in a case based on an adversary's notice pleading. It has narrowed the scope of required disclosure of witnesses and tangible things, including documents, to those matters "alleged with particularity in the pleadings." The accompanying Committee Notes to the proposal state:

Broad, vague, and conclusory allegations sometimes tolerated in notice pleading -- for example, the assertion that a product with many component parts is defective in some unspecified manner -- should not impose upon responding parties the obligation at that point to search for and identify all persons possibly involved in, or all documents affecting, the design, manufacture, and assembly of the product. The greater the specificity and clarity of the allegations in the pleadings, the more complete should be the listing of potential witnesses and types of documentary evidence.

The Judicial Conference Proposal has also moved toward the recommendation in the Section Report that the scope of discovery be narrowed. Thus, the required initial disclosure is limited to those matters "relevant to disputed facts," not to those matters that are "relevant to the subject matter involved in the pending action" or, as in the Committee Proposal, "likely to bear

significantly on any claim or defense." We are concerned, however, that the difference in the scope of disclosure for the required initial disclosure and other discovery may spawn unnecessary motion practice and urge consideration of uniformly narrowing the scope of all disclosure.

Limits On Depositions And Interrogatories

Proposed Rule 30(a)(2) requires court consent for there to be more than ten depositions conducted by the plaintiffs, defendants or third-party defendants in an action. Similarly, proposed Rule 33(a) requires court consent for any party to serve more than 25 interrogatories, including all discrete subparts. As the Section Report stated, we believe that it is premature for the Federal Rules of Civil Procedure to be modified to include presumptive limits on the number of depositions or interrogatories. The Section suggests that any limitation on the number of depositions or interrogatories should await the numerous local experiments that are being conducted under the Judicial Improvements Act of 1990 and Title I of the Civil Justice Reform Act of 1990 and under local rules.

In the Committee Notes to proposed Rule 26(a)(1), the Judicial Conference states that it is required to submit a report to Congress by December 31, 1995, reviewing the experiences of the several courts under the Civil Justice Reform Act and perhaps indicating the desirability of further changes. The Judicial Conference says that any changes recommended in its report could

not be implemented until December 1998 at the earliest, and therefore it would rather implement a series of disclosure obligations under the federal rules now.

The Section's answer to the Committee Notes is that by adopting the proposed federal rules, the Judicial Conference appears to be prejudging the desirability of limiting the number of depositions and interrogatories before all the evidence has been gathered. The Section does not believe that five more years of local experimentation in this area will cause a breakdown in the system of disclosure under the federal rules.

The Section applauds the Judicial Conference Proposal's modification of the Committee Proposal limiting the duration of depositions. Proposed Rule 30(d)(1) instead articulates a standard of behavior during depositions that may, if enforced by the courts under proposed Rule 30(d)(2), make a significant start in curing abusive behavior during depositions. Proposed Rule 30(d)(1) requires that objections be stated concisely in a non-argumentative and non-suggestive manner and that directions not to answer be made only to preserve a privilege, to enforce a previously imposed court limitation, or to present a motion that the examination is being conducted in bad faith or unreasonably to annoy, embarrass or oppress the deponent or a party. If a court finds that there has been an impediment, delay or other conduct that has frustrated the fair examination of the deponent, it may, under proposed Rule 30(d)(2), impose an appropriate sanction, including reasonable costs and attorneys' fees.

However, to the extent that proposed Rule 30(d)(2) encourages local rules to establish a presumptive limit for the duration of a deposition, the Section disapproves the suggestion. Limiting the length of depositions will not control harassment or gamesmanship during depositions and may have the undesired effect of promoting additional disputes among counsel. A presumptive limitation will burden the deposition process with disputes involving the length of time between questions and answers, the number of minutes spent marking exhibits, the number and length of breaks and other similarly petty matters. A presumptive limitation may also have an unfair impact on certain lawyers simply because of their interrogation style. A methodical style does not necessarily translate into any form of abuse. Moreover, some witnesses may be less than forthcoming, so that extra time must be spent to discover that witness's knowledge. Accordingly, the Section is pleased that the primary approach adopted by the Judicial Conference Proposal for reducing deposition abuse is to regulate and sanction the abusive tactics themselves.

Duty To Supplement Disclosure

Proposed Rule 26(e) imposes an affirmative duty upon a party to supplement prior disclosures or responses that are incomplete or incorrect in some material respect if the corrective information has not otherwise been made known during the discovery process or in writing. In particular, Proposed Rule 26(e)(1) requires supplementation of the required initial disclosure "at appropriate intervals," and Proposed Rule 26(e)(2) requires

supplementation of responses to an interrogatory, request for production or request for admission when the party learns that the prior response was materially incomplete or incorrect. Proposed Rule 37(c)(1) requires a court to exclude such supplementary information from evidence at trial, at a hearing or on a motion unless the failure to disclose was harmless or with substantial justification.

The Section endorses the principle of required supplementation of disclosure but is concerned that the proposed rule may generate too many collateral controversies, particularly regarding the timing of supplementation of responses. The requirement that initial disclosure be supplemented at appropriate intervals, without defining that term, is an invitation to a sui generis review by the court in each case in which a party may gain an advantage by having the information excluded under proposed Rule 37(c)(1). The requirement that an earlier response be corrected when a party learns it is materially incomplete or incorrect may impose a burdensome obligation in complex cases to review and update discovery responses on a continuing basis.

The Section believes that all disclosures should be supplemented, under the standards in proposed Rule 26(e), as part of the pretrial disclosures required to be made at least 30 days before trial under proposed Rule 26(a)(3). However, exclusion of evidence, unless the failure to supplement was harmless or with substantial justification, should not be a required sanction. Instead, if the nonsupplementing parties can demonstrate

substantial prejudice from the failure of the supplementing party to disclose the information earlier, then appropriate remedies should be formulated by the court, including further limited discovery, possibly at the expense of the withholding party, or perhaps exclusion of evidence.

Summary

While the Section endorses much of the Judicial Conference Proposal, the Section believes that it is too flawed to be promulgated without modification. The scope of discovery should be narrowed, there should not be a shift in the burden of the initial disclosure, the timing for the supplementation of responses should be clarified, and the sanctions for a failure to make initial disclosures or to supplement responses should be tailored to each case. The Section recommends that the Supreme Court or Congress either modify the Judicial Conference Proposal or reject it in its entirety so that a less flawed proposal may be produced.

Dated: March 18, 1993

Committee on Discovery:

Gregory K. Arenson, Chair
James A. Beha, II
Lawson F. Bernstein
Rosemary B. Boller
John J. Carlin
Harris N. Cogan
Thomas E. Fleming
Seth Goodchild
Richard F. Griffin
Lisa Gersh Hall
Beth Haroules
Martha K. Macinski

Joseph E. Moukad
David B. Newman
Carol Noymer
Allan M. Pepper
Nancy L. Pontius
Sharon M. Porcellio
Michael B. Sena
Peter T. Shapiro
Michael D. Tryon
Michael P. Vessa
Howard S. Wolfson

APPENDIX 18.—LETTER FROM WILLIAM K. SLATE II, PRESIDENT,
JUSTICE RESEARCH INSTITUTE, TO HON. WILLIAM J. HUGHES,
CHAIRMAN, JUNE 24, 1993

JUSTICE RESEARCH INSTITUTE

516 South Third Street Philadelphia, PA 19147-2308
Tel. (215) 574-8030 Fax (215) 574-8032

1800 M Street, NW, Suite 750 South
Washington, DC 20036-5802
Tel. (202) 785-5919 Fax (202) 785-5922

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JUN 29 1993

June 24, 1993

Sub on Courts

Hon. William J. Hughes
Chairman, Judiciary Subcommittee
on Intellectual Property and Judicial Administration
House of Representatives
241-CHOB
Washington, DC 20515

Re: Federal Rules of Civil Procedure
Rule 30(b)(4)

Dear Mr. Chairman:

It was a pleasure appearing before your Committee last week in support of maintaining 30(b)(4) in its present form.

A very significant point, only modestly referenced in my oral presentation, prompts this brief follow-up letter.

The point is this: Because an overwhelming percentage of depositions are transcribed, the review of those printed depositions enhances settlement and concurrently reduces the number of cases which go to trial.

Our research suggest that upwards of 98 percent of all depositions taken are transcribed and considered by counsel in determining whether to settle a case or go to trial. In that sense, it is not farfetched to see the transcribed deposition review as a form of ADR--diverting cases from going to trial. Hence, encouraging methodologies which preclude facile pretrial review of testimony will undoubtedly result in more civil trials for federal judges.

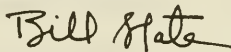
In fact, an analogous experience on the criminal side has recently been documented in California. A legislative initiative known as Proposition 115 was designed to "streamline" the criminal justice system by enabling parties to bypass preliminary hearings. The unfortunate result for the court system is that cases which would be sifted out at the preliminary hearing,

and charges reduced to something appropriate or dismissed, now end up in trials as cases that are very weak, but nobody knows it until they are tried. The rate of acquittals for criminal jury trials has increased substantially, and the impact on the courts of the time consumed needlessly has been found to be significant.

In conclusion, I would hope that the civil justice system would retain its important preliminary review stage through the use of printed depositions, and that neither the courts nor the Congress would promote a rule which has as its norm the encouragement of methodologies which are more expensive, less accurate, and foster the use of passé technologies which are not computer based.

Again, I reiterate my sincere thanks for your kindness at the public hearing, and also my high regard for your longstanding commitments to improvements in the administration of justice.

Yours sincerely,

A handwritten signature in dark ink, appearing to read "Bill Slate". The signature is fluid and cursive, with a long horizontal stroke at the end.

William K. Slate, II
President

APPENDIX 19.—LETTER FROM FULTON HAIGHT, PRESIDENT, AMERICAN COLLEGE OF TRIAL LAWYERS, TO THE SUBCOMMITTEE ON INTELLECTUAL PROPERTY AND JUDICIAL ADMINISTRATION, JUNE 28, 1993

American College of Trial Lawyers

8001 Irvine Center Drive, Suite 960
Irvine, California 92718

Telephone
(714) 727-3194

Telecopier
(714) 727-3894

Office of the President
Fulton Haight



June 28, 1993

1620 26th Street, Suite 4000 North
Santa Monica, California 90404
P. O. Box 680
Santa Monica, California 90406
(310) 449-6000
Fax (310) 829-5117

Intellectual Property and Judicial
Administration Subcommittee
U. S. House of Representatives
207 CHOB
Washington, D.C. 20515

Re: Proposed Amendments to Rule 26(a)(1)

Gentlemen:

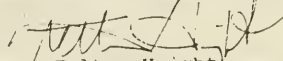
As President of the American College of Trial Lawyers, I have been provided with a copy of a "Statement of Business Roundtable Lawyers Committee, et al" urging that Congress delete proposed Section 26(a)(1) from pending Amendments to the Federal Rules of Civil Procedure.

Appendix C to that filing contains a "List of Signatories to Comments to the Judicial Conference in Opposition to Disclosure Submitted by Bar Associations, Business Associations, Corporations, Public Interest Groups, Attorneys and Judges." Amongst the organizations listed is the American College of Trial Lawyers.

This listing is in error. The Board of Regents of the American College of Trial Lawyers had previously voted that it would remain neutral on these proposals. At the early stage of the evolution of these proposed amendments, fairly strong tensions existed between the views of the Federal Rules of Civil Procedure Committee of the American College of Trial Lawyers and the Advisory Committee of the Judicial Conference. Thereafter, the American College of Trial Lawyers Committee was permitted to work with the Advisory Committee through numerous drafts, making ongoing suggestions, many of which were adopted. Therefore, while total agreement is not realistically achievable in this process, the American College of Trial Lawyers' Federal Rules of Civil Procedure Committee

has recommended that opposition to the Proposed Amendments is inappropriate. It has also expressed appreciation for the opportunity to work with the Advisory Committee on the evolution of these Rules. Based on the recommendation of the College's Civil Procedure Committee, the Board of Regents of the American College of Trial Lawyers determined to remain neutral on the proposed Rules now before Congress.

We request that you note this clarification.
Very truly yours,



Fulton Haight
President

FH:od/C844

cc: Honorable Sam C. Pointer, Jr.

**APPENDIX 20.—LETTER FROM J. MICHAEL MCWILLIAMS, PRESIDENT,
AMERICAN BAR ASSOCIATION (WITH ATTACHMENT), TO HON.
WILLIAM J. HUGHES, CHAIRMAN, JUNE 23, 1993**



J. MICHAEL MCWILLIAMS
Office of the President
American Bar Center
550 North Lake Shore Drive
Chicago, Illinois 60611
Telephone: (312) 988-5109
Fax: (312) 988-5100

AMERICAN BAR ASSOCIATION

Please Reply to:
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26th Floor
100 East Pratt Street
Baltimore, MD 21202
Telephone: 410/752-9704
Fax: 410/752-5228
ABA/net: JMCWILLIAMS1

RECEIVED

JUN 28 1993

June 23, 1993

Sup on Courts

The Honorable William J. Hughes
Chairman
Subcommittee on Intellectual Property
and Judicial Administration
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Hughes:

I am writing on behalf of the American Bar Association to urge Congress to defer adoption of the proposal in the amendments to Rule 26, the general provisions governing discovery, that would add a new requirement for automatic mandatory early disclosure of certain relevant "core" information "relevant to disputed facts alleged with particularity in the pleadings."

The ABA Board of Governors on June 18, 1993, adopted the following resolution:

Resolved that the American Bar Association urges Congress to defer until after December 31, 1995, consideration of the proposed amendments to Rules 26, 30, 31, 33, and 37 (relating to disclosure) of the Federal Rules of Civil Procedure (which would otherwise become effective on December 1, 1993), to permit the completion of the local district experimentation plans and the assessment of the impact of those programs mandated by the Civil Justice Reform Act of 1990 (CJRA), and to allow time to analyze the major changes proposed in the pending amendments to the Civil Rules within the framework of the CJRA.

This resolution was jointly proposed by the Tort and Insurance Practice Section, the Litigation Section, the General Practice Section, the Business Law Section and the Young Lawyers Division.

I ask that this policy statement be made a part of the record of the Subcommittee hearings on the proposed amendments that were held June 16, 1993.

Justice for
all

Civil Justice Reform Act of 1990

The ABA agrees with the need to reduce costs and delays in civil litigation in the federal courts, fully supports the objectives of the CJRA, and specifically endorses the concept of active, creative and effective case management. The program that was developed under the CJRA was developed within the context of the Rules Enabling Act. It incorporates the guidelines and principles of the legislation, including improved case management in trial courts, the formation of advisory groups, the evaluation of new management techniques, and the establishment of demonstration programs to experiment with different methods of reducing cost and delay and different case management techniques. Under this approach, district courts are permitted to develop their own civil justice expense and delay reduction plans, and the Judicial Conference is authorized to develop one or more model plans. Implementing the proposed amendments at this time would undermine the positive response to the Civil Justice Reform law by the bench and bar, and short circuit the serious efforts underway in the districts to reduce expense and delay.

The debate on the proposed disclosure amendments would greatly benefit from an evaluation of the experimentation undertaken under the requirements of the CJRA. The genius of that law is its recognition of the need for experimentation -- the freedom to learn by trial and error -- to achieve civil justice reform goals. Many of the expense and delay reduction plans developed by the various district courts require automatic disclosure of certain information by the parties. The 15 plans (of the plans thus far completed) that provide for some kind of automatic disclosure are: Northern District of California, District of Delaware, District of Idaho, Southern District of Illinois, Northern District of Indiana, District of Massachusetts, District of Montana, Eastern District of New York, Southern District of New York, Western District of Oklahoma, Eastern District of Pennsylvania, Eastern District of Texas, District of the Virgin Islands, Northern District of West Virginia, and District of Wyoming.

We believe that the orderly process enacted by the CJRA should not be truncated, as it would be if the proposed amendments to Rule 26 dealing with disclosure were permitted to go into effect on December 1, 1993. That is the deadline date for all districts to implement their cost and delay reduction plans. These plans will yield a substantial body of empirical information on the experience with various disclosure plans which the Judicial Conference will be evaluating as part of the report it is mandated to submit to Congress by December 31, 1995. Thereafter, as the CJRA contemplates, any recommendations could be handled expeditiously through the rulemaking process.

Rule 26 Disclosure Revision

The automatic mandatory disclosure duty contained in the amendments proposed by the Judicial Conference are drastic and untested and should not be implemented at this time. The proposed disclosure requirements contained in the Court's April 22, 1993, communication to Congress transmitting the proposed amendments to the Federal Rules of Civil Procedure supersedes the proposal contained in the Advisory Committee's draft rules, the only proposal that was subject to public comment. The new proposal emerged from the Advisory Committee's deliberations over the comments on the earlier version; and although the proposal is a very different formulation, it has not been subject to public review during the procedural rulemaking process.

I would also note that the Judicial Conference itself casts considerable doubt on the wisdom of proceeding with the proposed disclosure changes and acknowledges the need to accommodate the CJRA by including in the introductory clause of Rule 26 an opt-out provision "permitting any court, by local rule, to exempt all or particular types of cases from these disclosure requirements or to modify the nature of the information to be disclosed."

According to the Advisory Committee Notes on Rules 26 (at page 226, House Document 103-74, 103d Congress, 1st Session, Amendments to the Federal Rules of Civil Procedure and Forms):

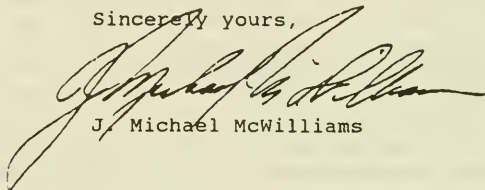
Authorization of these local variations is, in large measure, included in order to accommodate the Civil Justice Reform Act of 1990, which implicitly directs districts to experiment during the study period with differing procedures to reduce the time and expense of civil litigation. The civil justice delay and expense reduction plans adopted by the courts under the Act differ as to the type, form, and timing of disclosures required. Section 105(c)(1) of the Act calls for a report by the Judicial Conference to Congress by December 31, 1995, comparing experience in twenty of these courts; and section 105(c)(2)(B) contemplates that some changes in the Rules may then be needed. While these studies may indicate the desirability of further changes in Rule 26(a)(1), these changes probably could not become effective before December 1998 at the earliest.

Conclusion

The ABA continues to support the intent of the CJRA and believes that the positive results of the experimentation process in the districts should not be impeded by the premature imposition of this untested proposal. We are mindful that our

request for Congress to reject the disclosure duty proposed in the pending Rule 26 amendments may be viewed as a dilatory tactic. I assure you that this is not the case. The Association fully supports the Rules Enabling Act and has been an active participant in that process since its inception. We commend the Advisory Committee and the Judicial Conference for its diligent efforts in forging uniform rules of procedure for the federal courts. However, in this instance, the process was premature and incomplete. There was no opportunity for notice and comment in the drafting of the current formulation of the disclosure proposal, and the current proposal does not take into account the experience with the innovative disclosure plans implemented by the district courts under the CJRA. Before formulating a final national disclosure rule, this valuable information needs to be evaluated and any proposed formulation subject to the rulemaking process. We therefore urge Congress to defer adoption of the pending automatic mandatory disclosure provisions in the proposed amendment to Rule 26.

Sincerely yours,

A handwritten signature in dark ink, appearing to read "J. Michael McWilliams", written in a cursive style.

J. Michael McWilliams

Enclosure

AMERICAN BAR ASSOCIATION

TORT AND INSURANCE PRACTICE SECTION
 LITIGATION SECTION
 GENERAL PRACTICE SECTION
 BUSINESS LAW SECTION
 YOUNG LAWYERS DIVISION

REPORT TO THE BOARD OF GOVERNORS

RECOMMENDATION

RESOLVED, That the American Bar Association urges	1
Congress to defer until after December 31, 1995,	2
consideration of the proposed amendments to Rule 26,	3
30, 31, 33, and 37 (relating to disclosure) of the	4
Federal Rules of Civil Procedure (which would otherwise	5
become effective on December 1, 1993), to permit the	6
completion of the local district experimentation plans	7
and the assessment of the impact of those programs	8
mandated by the Civil Justice Reform Act of 1990 (CJRA),	9
and to allow time to analyze the major changes proposed	10
in the pending amendments to the Civil Rules within the	11
framework of the CJRA.	12

REPORT

On April 22, 1993, the Supreme Court of the United States, pursuant to 28 U.S.C. 2072, submitted to the Congress a sweeping package of amendments to the Federal Rules of Civil Procedure. The most controversial of the changes would substantially alter pretrial discovery by mandating a self-executing, continuing duty on each party to identify all witnesses and documents that are "relevant to disputed facts alleged with particularity in the pleadings."

The amendments will become effective on December 1, 1993, unless Congress passes legislation before that date to reject or modify the amendments, or to delay their implementation, in whole or in part.

The Major Alterations in the Civil Rules,
Particularly The New Mandatory Disclosure
Requirement,, Will Effectively Preempt And
Interfere With the Process Of Experimentation
With, And Evaluation Of, Methods For
Streamlining Civil Litigation That Congress
Mandated in The Civil Justice Reform Act of
1990.

In 1990, Congress enacted the Civil Justice Reform Act ("CJRA"), which required that every federal district court develop and implement local rules designed to attack the problem of delay and expense in civil litigation. The legislation provided for the involvement of advisory groups, comprised of attorneys and representatives of major categories of litigants. Thirty-eight districts already have experimental rules in place, while the rest of the ninety-four districts were to put their plans in place by the end of this year -- the same time that the proposed new civil rules are scheduled to go into effect. The Judicial Conference was to evaluate the results and report back to Congress by the end of 1995.

As Congress recognized when it enacted the CJRA, a period of extended experimentation at the local level, with ample room for trial and error and an opportunity for thoughtful analysis and reflection upon completion of the experimental period, would

likely produce the most valuable and effective reform by --

- permitting the collection of empirical data about the efficacy of proposed reforms,
- allowing an opportunity to involve those who will be affected by the reforms in the process of developing and implementing strategies for reform, and
- providing the flexibility to address the varying needs and ideas of diverse districts throughout the country.

Congress also recognized the need to develop a method of consultation, so that those who have developed effective techniques for reducing cost and delay in one district could share their techniques with those in other districts.

The proposed amendments in the Federal Rules of Civil Procedure would subvert this process of experimentation by putting in place, among other things, a radical new scheme of mandatory disclosure which is vague on its face and which raises many questions concerning its implementation and interpretation. While the proposed amendments nominally will allow local experimentation to continue, the decision to adopt uniform, national rules will inevitably disrupt and stifle the experimentation process that the CJRA set in motion, as litigants and courts struggle with the meaning and impact of the new national rules. As Justice Scalia put it in his dissent (joined by Justices Thomas and Souter) from the transmittal to Congress of the mandatory disclosure provision, this change is "potentially disastrous and certainly premature."

Conclusion

Less than three years ago, Congress mandated a period of local experimentation and study to identify the best methods for reforming civil litigation. The experiments mandated by the CJRA are currently underway and the report of the Judicial Conference is due in little more than two years. Congress should be asked at least to delay these controversial changes in the Federal Rules of Civil Procedure until the results of those CJRA experiments can be completed and analyzed.

Respectfully submitted

Leo J. Jordan, Tort and Insurance
Practice Section
Louise A. LaMothe, Litigation Section
Cameron C. Gamble, General Practice Section
John J. McCann, Business Law Section
Mark G. Sessions, Young Lawyers Division

June 1993

APPENDIX 21.—LETTER FROM JOHN J. PROUT, JR., C.S.R., PRESIDENT, JOHN J. PROUT & ASSOCIATES, INC., TO HON. WILLIAM J. HUGHES, CHAIRMAN, JUNE 23, 1993

JOHN J. PROUT & ASSOCIATES, INC.

CERTIFIED SHORTHAND REPORTERS

55 SPRINGFIELD AVENUE

SPRINGFIELD, N. J. 07081

TEL (201) 379-7015

FAX (201) 379-7326

RECEIVED

June 23, 1993

JUN 23 1993

Hon. William J. Hughes
2138 Rayburn House Office Building
Washington, D.C. 20515-6216

SUP ON COURTS

Dear Congressman Hughes:

Having attended the hearing you conducted last week on the proposed changes to Federal Rules of Civil Procedures, I want to express my appreciation for your time and consideration in hearing testimony regarding the proposed change to Rule 30(b)(4). I would also like to add some comments.

A question was raised as to the impact if the Rule 30(b)(4) proposed change goes into effect. It is my belief, and that of my colleagues, that the overall effect will be a greater consumption of judicial time than exists under the present rule.

As testified at the hearing by Judge Pointer, there have been no complaints about court reporters to warrant the change. Depositions presently are routinely transcribed accurately by court reporters. Although only a small percentage of cases filed reach trial, in this area at least 99% of Federal Court depositions are transcribed. The accurate transcription of depositions results in a smoother motion practice and, in fact, the settlement of many cases based on the testimony, accurately transcribed, at depositions.

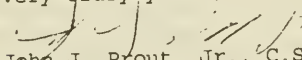
Because the proposed change provides no guidelines for accuracy, impartiality, and other matters inherent in the court reporter system, there will be an increase in motions to settle the record or disallow the use of deposition testimony because of an inaccurate record, or even a dispute as to what is on a tape recording versus the transcript thereof. Under the proposed rule, tapes could be transcribed by the lawyer's secretary, or even the litigant. Certainly the impartiality of the transcript would be the subject of a motion. As we all know, there have been many disputes about tape transcription in court cases and, although many years ago, in the House Judiciary Committee regarding Watergate. Although the proposal allows the opposing side to use a court reporter, that, too, will lead to motions as to which record is to be utilized in motions or trial.

It is for these reasons that we believe the proposal will have a detrimental impact on court time and would urge that the proposal be rejected.

I would request that my comments be considered part of the record.

Thank you for your consideration. Should you have any questions or need further information, I would be happy to respond.

Very truly yours,



John J. Prout, Jr., C.S.R.
President

JJP/et

APPENDIX 22.—LETTER FROM ROBERT DALE KLEIN, CHAIRMAN, SPECIAL COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, THE MARYLAND ASSOCIATION OF DEFENSE TRIAL COUNSEL, INC., TO HON. WILLIAM J. HUGHES, CHAIRMAN, JUNE 22, 1993



THE MARYLAND ASSOCIATION OF DEFENSE TRIAL COUNSEL, INC.

June 22, 1993

VIA FEDERAL EXPRESS

The Honorable William J. Hughes, Chairman
House Subcommittee on Intellectual Property and
Judicial Administration
207 Cannon House Office Building
Washington, D. C. 20515-6216

Attention: Edward O'Connell, Esquire

Re: Proposed New Rule 26(a)(1) to Federal Rules of Civil Procedure

Dear Mr. Chairman:

On behalf of The Maryland Association of Defense Trial Counsel, Inc. ("MADTC"), I write to register the Association's opposition to proposed new Rule 26(a)(1) of the Federal Rules of Civil Procedure concerning so-called "core discovery disclosure."

The MADTC membership includes approximately 600 Maryland attorneys whose principle practice involves representation of defendants in civil litigation. The Association is dedicated to the integrity and preservation of the civil justice system. Its mission is to promote the efficiency of the legal system and fair and equal treatment under the law. Accordingly, the MADTC supports the goals of streamlining and rendering cost-efficient the resolution of civil litigation. In deference to these goals, the MADTC submits that the radical amendment of discovery procedures embodied in Rule 26(a)(1), rather than streamlining and reducing litigation costs, will in fact have the exact opposite result.

MADTC

P.O. Box 21431
Baltimore, Maryland 21208
(410) 484-6266 • Fax (410) 484-6836

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Fangs & Rosenberg
410) 752-9722

PRESIDENT-ELECT
S. JANEY PRESTON
Gibson, Devines, Leach & Gray
410) 753-4025

SECRETARY
ANDREW LAPAYOWSKER
Cann Centre Petroleum Corp
410) 659-4834

TREASURER
P. FROLOCKER
J. Woods, Taylor & Preston
410) 347-8765

APPELLATE PRACTICE
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Fangs & Rosenberg
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410) 752-9740

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Fangs & Rosenberg
410) 385-3641

LEGISLATIVE
GERTRUDE C. BARTEL
Klamm & Graham
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MEMBERSHIP
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Smith, Schemm & Case
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PROGRAM
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PETER J. MCHAMARA
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PUBLIC SERVICE & PRO BONO
DEBRA J. HIRSHKOWITZ
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DR. STATE REPRESENTATIVE
AVES K. ARCHBOLD
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PROFESSIONAL MALPRACTICE
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WORKERS' COMPENSATION
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IMMEDIATE PAST-PRESIDENT
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EXECUTIVE DIRECTOR
MICHAEL D. GIBBS
Sennels, Brown & Sennels
410) 576-4862

Supreme Court's Transmittal: The Supreme Court's transmittal of this Rules change to Congress should not be understood as an endorsement of the substance of the proposal. The transmittal letter at best was lukewarm, given that the Chief Justice states that "while the Court is satisfied that the required procedures have been observed, this transmittal does not necessarily mean that the Court itself would have proposed these amendments in the form submitted."

Justice White issued a separate statement, distancing the Supreme Court from the proposal. He spent six pages discussing the limited role that the Supreme Court historically has taken in reviewing proposed Rules changes. He displayed no enthusiasm for the proposal the Court was forwarding to Congress.

Of even greater interest is the dissent penned by Justice Scalia, and joined by Justices Thomas and Souter, with respect to the issue of the inclusion of a new requirement of pre-discovery core disclosure. Justice Scalia poignantly notes:

The proposed radical reforms to the discovery process are potentially disastrous and certainly premature -- particularly the imposition on litigants of a continuing duty to disclose to opposing counsel, without awaiting any request, various information "relevant to disputed facts alleged with particularity." .. This proposal is promoted as a means of reducing the unnecessary expense and delay that occur in the present discovery regime. But the duty-to-disclose regime does not replace the current, much criticized discovery process; rather it *adds a further layer of discovery*. It will likely *increase* the discovery burdens on district judges, as parties litigate about what is "relevant" to "disputed facts," whether those facts have been alleged with sufficient particularity, whether the opposing side has adequately disclosed the required information, and whether it has fulfilled its continuing obligation to supplement the initial disclosure. Documents will be produced that turn out to be irrelevant to the litigation, because of the early inception of the duty to disclose and the severe penalties on a party who fails to disgorge in a manner consistent with the duty. ..." (*Dissenting Statement*, p. 4) (Emphasis in original).

Justice Scalia goes on to urge that "any major reform of the Discovery Rules should await completion of the pilot programs authorized by Congress [pursuant to the Civil Justice Reform Act of 1990], especially since courts already have substantial discretion to control discovery." (*Dissenting Statement*, p. 6).

The MADTC respectfully submits that Congress should not rush to adopt an untested and

additional layer of discovery procedures based, at best, on anecdotal reports of "discovery abuse." Prudence suggests that Congress take a wait-and-see approach, and await the outcome of the Rules experiments currently in progress under the pilot programs in several federal districts pursuant to the Civil Justice Reform Act of 1990.

NCSC Studies: Enclosed are copies of two recently-issued studies conducted by the National Center for State Courts ("NCSC"). One study analyzes data from 2,190 cases in five different state's courts; the other consists of a survey of 260 attorneys in those states. These studies essentially conclude that there is no need for changing discovery procedures, and that such changes would not necessarily "cure" anecdotal reports of "discovery abuse." A fair interpretation of the studies is that to the extent that discovery abuse occurs from time to time, it is not a rampant problem and, moreover, tends to be caused by the personalities of the particular individuals involved. Those personalities will not be cured by new Rules changes. Rather, Rules changes would simply afford a different set of procedures available for abuse. Although the studies dealt with discovery in state court practice, in the experience of our Association, the findings would be equally applicable to discovery under the Federal Rules of Civil Procedure.

In the study entitled *Is Civil Discovery in State Trial Courts Out of Control?*, discovery practices in the courts of five states where discovery papers are still filed were analyzed. Interestingly, the study found that discovery is conducted less often than many observers have asserted. Secondly, the amount of discovery and discovery-related motions activity tends to be a function of case type and complexity.

The study found that, across the five courts, only 58% of general civil cases have discovery. The corollary to this finding is that a substantial proportion of cases (42%) have no formal discovery. In light of this finding, the study concludes that:

Automatic disclosure requirements such as those proposed for the Federal Rules of Civil Procedure, and implemented in several federal district courts as well as in Arizona, therefore, may result in imposing a greater burden on litigants because a relatively large proportion of cases currently do not incur costs for formal discovery. Rather than reducing costs and thus facilitating access to the civil justice system, automatic disclosure requirements may put further restraints on litigants whose disputes are on the edge of being economical to pursue. Raising costs at the front end of litigation also leaves less money for settlement and may encourage defendants to hold out longer than they otherwise might have. The burden of motion practice on the courts may not be alleviated because the disclosure rules themselves could generate motions over non-compliance or

disagreements about what information is significantly related to the claims or defenses raised in the pleadings. (*Id.*, at p.21)

Although the study does not conclude that these results necessarily would happen, these considerations certainly must be weighed heavily before one rushes to adopt automatic disclosure requirements.

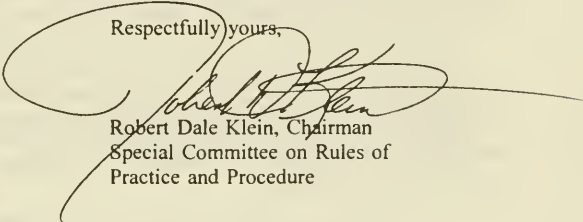
The NCSC study further concludes as follows:

Perhaps the most salient observation that can be made from the NCSC study is that *for the majority of civil litigation formal discovery is not out of control*. Although discovery reform may be necessary to address problems that are not discernible from court records, the courts and the bar can take remedial measures without instituting major changes in the rules governing discovery. Most courts currently have some tools to curb excessive discovery, minimize discovery disputes, and promote greater self-reliance in resolving disputes that arise. (*Id.*, at p. 23) (Emphasis added).

The second NCSC study, *Attorneys' Views of Civil Discovery*, reports that the following four factors are most predictive of discovery problems (in order of probability): (1) personality or style of the opposing attorney; (2) inexperience of the opposing attorney; (3) animosity between the parties; and (4) a large monetary claim. *Id.*, at pp. 14-15. Furthermore, the attorneys rated the setting of a time frame for completing discovery as the single-most effective measure to benefit the discovery process, and they rated "two-stage discovery processes" -- such as automatic pre-discovery disclosure procedures -- as the least effective. *Id.*, at pp. 22-23.

Conclusion: The MADTC does not oppose most of the Rules amendments forwarded to Congress. However, we do oppose the proposed amendment to Rule 26(a)(1), and urge that Congress delete that amendment from the package.

Respectfully yours,



Robert Dale Klein, Chairman
Special Committee on Rules of
Practice and Procedure

RDK/jo
Enclosures

APPENDIX 23.—LETTER FROM BARBARA ALLEN BABCOCK, ET AL.,
ERNEST W. MCFARLAND PROFESSOR OF LAW, STANFORD LAW
SCHOOL, TO HON. JACK BROOKS, CHAIRMAN, COMMITTEE ON THE
JUDICIARY, JUNE 11, 1993

STANFORD LAW SCHOOL

June 11, 1993

The Honorable Jack Brooks
House of Representatives
Chairman, Judiciary Committee
2449 Rayburn House Office Building
Washington, D.C. 20515-4309

RECEIVED

JUN 14 1993

JUDICIARY COMMITTEE

Dear Representative Brooks:

We write as procedure professors to urge that Congress not delay the effective dates of the proposed amendments to the Federal Rules of Civil Procedure.

Under a regime that has served us well for 50 years, Congress has three options at this point in the Rule-making process: Do nothing; delay the effective date of some, or all, of the Rules; reject them altogether or in part. The first option is the norm unless Congress believes not only that the proposals are affirmatively bad, but that they are worse than the present versions, and/or they exceed the Rules Enabling Act powers, and/or they hurt discrete groups of litigants, and/or they result from gross failures in the rule-making process. None of these conditions for rejection or delay is met.

On the first, major condition, we believe that the new rules are substantial improvements over the old. Let us explain briefly why as to the two areas of change that seem most controversial. Rule 11, in its present form has not worked out in practice. Building on what we have learned, the new version is an important refinement for many reasons including that it will cut down on the excessive, satellite litigation created by the present rule over the past decade.

The second set of proposed Rules that have prompted contention are those on discovery. For far more than a decade, discovery procedures have been a sore spot in the system. Proposed Rule 26 is designed to eliminate wasteful and unnecessary paperwork and game playing, mainly through automatic disclosure provisions that many districts are already experimenting with under the Civil Justice Reform Act. The proposed rule expressly preserves local option, either through a general rule or case-by-case orders. This amendment is very much in keeping with the letter and spirit of the CJRA, and would, moreover, resolve the present uneasy situation in which the experimentation that Congress directed under the CJRA is in apparent conflict with the discovery rules on the books.

As to the other reasons for Congressional intervention, there are obviously no Rules Enabling Act problems: no discrete group of litigants is hurt because disclosure requirements fall equally on all sides of a law suit; and as Justice White pointed out, there was no process failure in the rule making. Generally speaking, we urge the wisdom of Justice White's statement that accompanied the Court's transmission of the rules -- a statement made more weighty because issued as one of his last judicial acts.

Speaking from his own 31 years on the Court, and summarizing the experience of 21 Justices who have sat during that period, Justice White emphasized that the major place for debate, re-working and re-wording of proposed rules is in the Advisory and Standing committees of the Judicial Conference. We would add that the last few years have seen extended debate on the proposed rules, and the continued revision by the Committees in response to the input of many groups: the recent exchanges have been examples of the excellence of this process. Far from being "radical" (see Justice Scalia's statement), the proposed disclosure rules have been adopted in many districts under the CJRA and in states under their procedure codes.

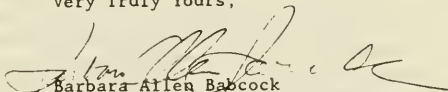
In urging that the rules deserve passage, we do not support their every jot and tittle, but rather the process that produced them. The design-burden of the rules should be on those who use them every day, with full opportunity at the Advisory committee level especially for all interest groups to make themselves heard. As we already noted, these rules have already been the subject of much give and take. If the resulting work of the Judicial Conference committees were routinely up for grabs before the Congress, it would throw the civil litigation system into a state of flux and uncertainty, militating against the very purpose of Rules: to direct and predict behavior.

On the basis of our fifty or so (cumulatively) years of teaching and writing about the Federal Rules of Civil Procedure, we think it would be a sad and serious error for Congress to re-work and re-word the current proposals, and could have the unintended consequence of changing for the worse our system of rule-making. While there may be appropriate occasions for Congress to consider the fine points of the Rules, this set of Rules, which has been so thoroughly vetted in appropriate forums, is surely not one of them.

Finally, in addition to urging that you permit the proposed amendments to become effective, we do commend one statutory change to you. This would be an appropriate time for Congress to make the Judicial Conference rather than the Supreme Court, the promulgator as well as the producer of the rules. A principle reason for this change (as both Justices Scalia and White point out) is that the Court is in an anomalous position if it must pass on the ultimate constitutionality of some of the rules it promulgates. Moreover, as Justice White explained, the members of the Court are ill-suited to judge, ex ante, the utility and wisdom of proposed changes in trial practice. In reality, the justices rarely do make such judgments; generally they promulgate the rules without comment. Given Justice White's thoughtful description of the reality of the process, we hope that the Congress will enact legislation to conform the structure of rulemaking to the reality of the process.

Thank you for your consideration of our views on this important matter.

Very Truly Yours,


 Barbara Allen Babcock
 Ernest W. McFarland Professor of Law
 Stanford Law School

Janet Cooper Alexander
 Janet Cooper Alexander
 Associate Professor of Law
 Stanford Law School

Janet E. Halley
 Janet E. Halley
 Associate Professor of Law
 Stanford Law School

Linda J. Krieger
 Linda J. Krieger
 Lecturer in Law
 Stanford Law School

Judith Resnik
 Judith Resnik
 Orrin B. Evans Professor of Law
 University of Southern California
 Law Center

cc: Members of the Senate Judiciary Committee
 (Copies Enclosed)

APPENDIX 24.—LETTER FROM NAN ARON, EXECUTIVE DIRECTOR,
ALLIANCE FOR JUSTICE, ET AL. (WITH ATTACHMENT), TO HON.
WILLIAM J. HUGHES, CHAIRMAN, JUNE 16, 1993

Alliance for Justice

A National Association of Organizations Working for Equal Justice

1601 Connecticut Avenue, N.W. Suite 600 ■ Washington, D.C. 20009 ■ 202/332-3224

NAN ARON
Executive Director

CHAIRMAN: J. BROWNSHAW
VICE

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Justice Center

Equal Rights Advocates & Society

Equal Rights and
Justice Center

Equal Rights Center

Equal Rights Law Project

Equal Rights Law Project
and Education Fund

Equal Rights Association

Equal Rights Center and
Education Fund

Equal Rights Foundation

Equal Rights Law Center

Equal Rights Law Fund

Equal Rights Law Center
Fund

Equal Rights Law Center
Fund

Equal Rights Law Center

Equal Rights Law Center

Equal Rights Law Center

Equal Rights Law Center

The Honorable William J. Hughes
Chairman, Subcommittee on Intellectual Property
and Judicial Administration
House Judiciary Committee
207 Cannon House Office Building
Washington, DC 20515

Dear Chairman Hughes:

We, the undersigned organizations, are writing to express our views on the proposed amendments to the Federal Rules of Civil Procedure currently before the Subcommittee on Intellectual Property and Judicial Administration of the House Judiciary Committee. As representatives of public interest litigants, we have a tremendous interest in the federal court system and its goal of providing to all citizens fair and equal access to justice.

We applaud the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States for the proposed rule changes, which attempt to streamline litigation, curtail discovery abuses, and increase judicial power to control the litigation process. We respect these laudable goals and enthusiastically support many of the amendments.

We are particularly supportive of the proposed changes to Rule 11. In its current form, the rule has generated exactly what it was meant to eliminate: excessive and needless litigation. More importantly, it has been disproportionately and unfairly applied to public interest and civil rights plaintiffs. The revised rule is intended to address both problems, and we believe that overall it does so very successfully. Accordingly, we strongly urge the Subcommittee to work expeditiously to ensure its prompt enactment.



Our unqualified support for revised Rule 11 leads us to request that the Subcommittee consider reviewing -- and endorsing -- it separately from the rest of the proposed amendments. Both plaintiff and defendant legal representatives appear to support it enthusiastically and, for the most part, unconditionally. We know that other proposals will generate more substantial opposition and may warrant more extensive review than Rule 11. We implore the Subcommittee to act promptly on the latter, which represents a long overdue and welcome attempt to restore balance and fairness to the federal litigation process. Our substantive comments on the entire amendments follow.

RULE 11

We strongly support the Rule 11 revisions. The current rule has created an explosion of satellite litigation that is excessively burdening courts and frustrating virtually all members of the trial bar. Moreover, it is disproportionately used against plaintiffs, particularly civil rights plaintiffs. Finally, Rule 11 in its current form has become less of a vehicle for curtailing frivolous litigation and more of an avenue through which lawyers battle each other over awards of costs and attorneys' fees.

Several proposed changes are particularly noteworthy. First, the revised rule explicitly exempts discovery procedures from its scope. This clarification will reduce the enormous litigation that has arisen over the proper application of the current rule. Second, making sanctions permissive rather than mandatory will curtail much marginal Rule 11 litigation; by decreasing the likelihood of sanctions, the rule will also lessen the potential for lawyers to recover costs and attorneys' fees and thus provide a disincentive for filing questionable sanctions motions. Third, the revised rule appropriately focuses on deterrence rather than compensation by specifically limiting sanctions to an amount necessary to deter similar violations and explicitly permitting sanctions to be paid to the court as "a penalty" rather than to the opposing party. When sanctions are awarded to the opposing party, they are limited to reasonable attorneys' fees and expenses incurred due to the violative conduct. This provision will also help reduce the current rule's financial incentive for attorneys to move for sanctions.

Fourth, as proposed the rule provides for a 21-day "safe harbor" period during which a party, once notified of a motion for sanctions against it, can modify or withdraw the challenged pleading. This provision will allow parties to resolve potential sanctions issues without involving the court's time and resources and should reduce Rule 11 litigation considerably. Justice Scalia has claimed that "those who file frivolous suits and pleadings should have no 'safe harbor'." (*See* Amendments to the Federal Rules of Civil Procedure and Forms, as announced April 22, 1993 (Scalia, J., dissenting) (attached)). The original intent of Rule 11, however, was not to punish those who plead in error, but to remove frivolous lawsuits from the courts. Providing a "safe harbor" does not free a party from warranted punishment, but simply allows a party to reconsider their pleadings when objections about

their merit have been raised. By permitting the party to amend its pleadings and avoid sanctions, this provision will better serve the rule's true purpose of discouraging non-meritorious litigation.

DISCOVERY

The proposed rules make major changes in discovery, including mandatory disclosure of certain items, limits on the use of depositions and interrogatories, mandatory supplementation of discovery responses, and methods of recording deposition testimony. We take no position on most of the mandatory disclosure additions (Rule 26(a)), although we do oppose the requirement regarding damages calculations (Rule 26(a)(1)(C)), which is simply unworkable. Such calculations may not be able to be made that early in the litigation process because the actual amount of damages is not known. This is especially true when critical information bearing on damages is in the hands of the defendant.

We approve of the changes to Rule 26(e) requiring mandatory supplementation of discovery responses. The present rule, under which parties do not supplement unless specifically asked, does not work. Parties should have a right to rely on discovery responses without being told at trial that the information is stale. Our only concern is the language regarding when supplementation must occur ("at appropriate intervals" for mandatory disclosures, *see* Rule 26(e)(1); "seasonably" for other disclosures, *see* Rule 26(e)(2)). The language in both is too vague and should be replaced by a requirement to supplement within 30 days of discovering that information is erroneous or no longer entirely accurate.

The ten-deposition limit (Rule 30(a)(2)(A)) is likely to be overly restrictive in many cases, but we are not opposed to it in light of the provision allowing the parties to stipulate, without judicial intervention, for a larger number of depositions to be taken. We do oppose, however, the 25-interrogatory limit (Rule 33(a)). The rule is especially problematic for plaintiffs, who typically use interrogatories to gain basic information about a defendant's practices. Generally, the use of interrogatories is an efficient way to avoid more expensive forms of discovery, thus significantly limiting them appears unwise.

We strongly support the proposal regarding the methods for recording deposition testimony (Rule 30(b)). As revised, the rule allows testimony in a deposition to be recorded by "sound, sound-and-visual, or stenographic means." This change is particularly beneficial to public interest litigants, who generally have limited financial resources, since it will allow audiotaping or videotaping of depositions, less expensive forms of recordation than stenography. We implore the Committee to accept this important change.

EXPERTS

We oppose proposed Rule 26(a)(2)(B) & (C), which require parties to submit, for each expert witness, a written report 90 days prior to trial detailing the substance of the expert's expected testimony. Intended to render pre-trial preparation more efficient and less expensive, the revision is likely to have precisely the opposite effect by necessitating additional work that does not advance the litigation.

Sophisticated litigants typically take the depositions of opposing experts. Although the current rules do not allow these depositions as of right, opposing counsel generally agree to them since it is in everyone's interest to learn as much as possible about the opinions the opponent will offer. Expert depositions are an occasion for probing the scope of the expert's opinion and the basis for the conclusions. They are very effective in narrowing the issues in dispute at trial.

A written report is unlikely to obviate the need for and usefulness of depositions. Instead, the report will simply become another subject of inquiry in a deposition. Conversely, the requirement will undoubtedly increase the cost of litigation, because experts will be paid to draft reports and counsel will spend time reviewing and commenting on drafts. These added costs will be especially onerous for civil rights and public interest plaintiffs, who, except in employment litigation, cannot recover the costs of expert expenses even when they prevail.

More generally, the time deadlines for disclosure of expert testimony (Rule 26(a)(2)(C)) should be tied to the close of discovery rather than the trial date, since the apparent purpose of the deadlines is to allow enough time for pre-trial discovery and to protect litigants against delaying tactics. Under the proposed rule, a litigant may not receive the names of some witnesses she needs to depose until after the discovery date has passed. Ninety days before the end of discovery is a more reasonable deadline.

ATTORNEYS' FEES

The proposed changes in Rule 54 specify a time for filing attorneys' fees motions and permit referral of attorneys' fees matters to special masters or magistrates. Revised Rule 58 clarifies the relationship between appeals on the merits and the determination of fee awards.

In general, we support the special masters or magistrates provision. Fee litigation is so distasteful and often so protracted that any chance of prompt resolution seems agreeable. We do object, however, to the 14-day period for filing. It is much too short a time to prepare the extensive documentation regarding hours, expenses, and other necessary information. Many local rules have a 60-day time limit, which is far more reasonable.

We also have difficulty with the proposed changes to Rule 58, which streamline fee litigation and judgment appeals. First, when the party against whom a fee claim lies is going to appeal the underlying judgment, it is usually futile to litigate the fee question before the appeal. The reason is obvious -- if the judgment is reversed or modified, then the question of fees generally becomes irrelevant. Accordingly, except in the most uncomplicated fee cases, litigating the fee issue prior to or simultaneously with an appeal seems unwise and a waste of judicial resources.

Second, the tolling rule -- stating that an order tolling the time for appeal must be entered before notice of appeal is filed and becomes operative -- is rather circuitous. Since the order must be preceded by the filing of a motion for fees, and prior notice of that motion must be given to the adverse party, the latter will nearly always be able to file, if she desires, a notice of appeal before a tolling order can be entered. As a practical matter, adjudication of the fee question before appeal will only occur if the parties have agreed that the case should proceed that way. The proposed streamlining rule appears confusing and of dubious value.

CONCLUSION

Overall, we support the proposed amendments to the Federal Rules of Civil Procedure. They are a welcome attempt to restore fairness and equity to the federal litigation process, which for too long has been disproportionately costly and burdensome to plaintiffs. As noted above, we urge the Committee to promptly endorse revised Rule 11, which appears to be widely supported by all interested parties. The remainder, including some of the ones we highlighted as particularly troublesome, should be considered separately if necessary to ensure that enactment of Rule 11 is not delayed.

Respectfully,



Nan Aron

On behalf of:

*ALLIANCE FOR JUSTICE
BAZELON CENTER FOR MENTAL
HEALTH LAW
CENTER FOR LAW AND SOCIAL
POLICY
MEXICAN-AMERICAN LEGAL DEFENSE
AND EDUCATIONAL FUND
NATIONAL LEGAL AID AND
DEFENDER ASSOCIATION*

will eliminate a significant and necessary deterrent to frivolous litigation; and the discovery proposal will increase litigation costs, burden the district courts, and, perhaps worst of all, introduce into the trial process an element that is contrary to the nature of our adversary system.

I

Rule 11

It is undeniably important to the Rules' goal of "the just, speedy, and inexpensive determination of every action," Fed. Rule Civ. Proc. 1, that frivolous pleadings and motions be deterred. The current Rule 11 achieves that objective by requiring sanctions when its standards are violated (though leaving the court broad discretion as to the manner of sanction), and by allowing compensation for the moving party's expenses and attorney's fees. The proposed revision would render the Rule toothless, by allowing judges to dispense with sanction, by disfavoring compensation for litigation expenses, and by providing a 21-day "safe harbor" within which, if the party accused of a frivolous filing withdraws the filing, he is entitled to escape with no sanction at all.

To take the last first: In my view, those who file frivolous suits and pleadings should have no "safe harbor." The Rules should be solicitous of the abused (the courts and the opposing party), and not of the abuser. Under the revised Rule, parties will be able to file thoughtless, reckless, and harassing pleadings, secure in the knowledge that they have nothing to lose: If objection is raised, they can retreat without penalty. The proposed revision contradicts what this Court said only three years ago: "Baseless filing puts the machinery of justice in motion, burdening courts and individuals alike with needless expense and delay. Even if the careless litigant quickly dismisses the action, the harm triggering Rule 11's concerns has already occurred. Therefore, a litigant who violates Rule 11 merits sanctions even after a dismissal." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 398 (1990). The advisory committee itself was formerly of the same view. *Ibid.* (quoting Letter from Chairman, Advisory Committee on Civil Rules).

The proposed Rule also decreases both the likelihood and the severity of punishment for those foolish enough not to seek refuge in the safe harbor after an objection is raised. Proposed subsection (c) makes the issuance of any sanction discretionary, whereas currently it is required. Judges, like other human beings, do not like imposing punishment when their duty does not require it, especially upon their own acquaintances and members of their own profession. They do not immediately see, moreover, the system-wide benefits of serious Rule 11 sanctions, though they are intensely aware of the amount of their own time it would take to consider and apply sanctions in the case before them. For these reasons, I think it important to the effectiveness of the scheme that the sanctions remain mandatory.

Finally, the likelihood that frivolousness will even be challenged is diminished by the proposed Rule, which restricts the award of compensation to "unusual circumstances," with monetary sanctions "ordinarily" to be payable to the court. Advisory Committee Notes to Proposed Rule 11, pp. 53-54. Under Proposed Rule 11(c)(2), a court may order payment for "some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation" only when that is "warranted for effective deterrence." Since the deterrent effect of a fine is rarely increased by altering the identity of the

AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

[April 22, 1993]

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, and with whom JUSTICE SOUTER joins as to Part II, filed a dissenting statement.

I dissent from the Court's adoption of the amendments to Federal Rules of Civil Procedure 11 (relating to sanctions for frivolous litigation), and 26, 30, 31, 33, and 37 (relating to discovery). In my view, the sanctions proposal

¹In dissenting from the order transmitting the Chapter XIII Bankruptcy Rules, Justice Douglas, among other things said: "Forty years ago I had perhaps some expertise in the field; and I know enough about history, our Constitution, and our decisions to oppose the adoption of Rule 920. But for most of these Rules I do not have sufficient insight and experience to know whether they are desirable or undesirable. I must, therefore, disassociate myself from them." 411 U.S. 992, 994 (1973).

With respect to Amendments to the Rules of Criminal Procedure forwarded by the Court a year later, the following statement was appended to the Court's order 416 U.S. 1003 (1974): "MR. JUSTICE DOUGLAS is opposed to the Court's being a mere conduit of Rules to Congress since the Court has had no hand in drafting them and has no competence to design them in keeping with the titles and spirit of the Constitution."

payee, it takes imagination to conceive of instances in which this provision will ever apply. And the commentary makes it clear that even when compensation is granted it should be granted stingily—only for costs “directly and unavoidably caused by the violation.” *Id.*, at 54. As seen from the viewpoint of the victim of an abusive litigator, these revisions convert Rule 11 from a means of obtaining compensation to an invitation to throw good money after bad. The net effect is to decrease the incentive on the part of the person best situated to alert the court to perversion of our civil justice system.

I would not have registered this dissent if there were convincing indication that the current Rule 11 regime is ineffective, or encourages excessive satellite litigation. But there appears to be general agreement, reflected in a recent report of the advisory committee itself, that Rule 11, as written, basically works. According to that report, a Federal Judicial Center survey showed that 80% of district judges believe Rule 11 has had an overall positive effect and should be retained in its present form, 95% believed the Rule had not impeded development of the law, and about 75% said the benefits justify the expenditure of judicial time. See Interim Report on Rule 11, Advisory Committee on Civil Rules, reprinted in G. Vairo, *Rule 11 Sanctions: Case Law Perspectives and Preventive Measures*, App. I-8-I-10 (2d ed. 1991). True, many lawyers do not like Rule 11. It may cause them financial liability, it may damage their professional reputation in front of important clients, and the cost-of-litigation savings it produces are savings not to lawyers but to litigants. But the overwhelming approval of the Rule by the federal district judges who daily grapple with the problem of litigation abuse is enough to persuade me that it should not be gutted as the proposed revision suggests.¹

II

Discovery Rules

The proposed radical reforms to the discovery process are potentially disastrous and certainly premature—particularly the imposition on litigants of a continuing duty to disclose to opposing counsel, without awaiting any request, various information “relevant to disputed facts alleged with particularity.” See Proposed Rule 26(a)(1)(A), (a)(1)(B), (e)(1). This proposal is promoted as a means of reducing the unnecessary expense and delay that occur in the present discovery regime. But the duty-to-disclose regime does not replace the current, much-criticized discovery process, rather, it adds a further layer of discovery. It will likely increase the discovery burdens on district judges, as parties litigate about what is “relevant” to “disputed facts,” whether those facts have been alleged with sufficient particularity, whether the opposing side has adequately disclosed the required information, and whether it has fulfilled its continuing obligation to supplement the initial disclosure. Documents will be produced that turn out to be irrelevant to the litigation, because of the early inception of the duty to disclose and the severe

penalties on a party who fails to disgorge in a manner consistent with the duty. See Proposed Rule 37(c) (prohibiting, in some circumstances, use of witnesses or information not voluntarily disclosed pursuant to the disclosure duty, and authorizing divulgement to the jury of the failure to disclose).

The proposed new regime does not fit comfortably within the American judicial system, which relies on adversarial litigation to develop the facts before a neutral decisionmaker. By placing upon lawyers the obligation to disclose information damaging to their clients—on their own initiative, and in a context where the lines between what must be disclosed and what need not be disclosed are not clear but require the exercise of considerable judgment—the new Rule would place intolerable strain upon lawyers’ ethical duty to represent their clients and not to assist the opposing side. Requiring a lawyer to make a judgment as to what information is “relevant to disputed facts” plainly requires him to use his professional skills in the service of the adversary. See Advisory Committee Notes to Proposed Rule 26, p. 96.

It seems to me most imprudent to embrace such a radical alteration that has not, as the advisory committee notes, see *id.*, at 94, been subjected to any significant testing on a local level. Two early proponents of the duty-to-disclose regime (both of whom had substantial roles in the development of the proposed rule—one as Director of the Federal Judicial Center and one as a member of the advisory committee) at one time noted the need for such study prior to adoption of a national rule. Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. Pitt. L. Rev. 703, 723 (1989); Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 Vand. L. Rev. 1295, 1361 (1978). More importantly, Congress itself reached the same conclusion that local experiments to reduce discovery costs and abuse are essential before major revision, and in the Civil Justice Reform Act of 1990, Pub. L. 101-650, §§ 104, 105, 104 Stat. 5097-5098, mandated an extensive pilot program for district courts. See also 28 U. S. C. §§ 471, 473(a)(2)(C). Under that legislation, short-term experiments relating to discovery and case management are to last at least three years, and the Judicial Conference is to report the results of these experiments to Congress, along with recommendations, by the end of 1995. Pub. L. 101-650, § 105, 104 Stat. 5097-5098. Apparently, the advisory committee considered this timetable schedule too prolonged, see Advisory Committee Notes to Proposed Rule 26, p. 95, preferring instead to subject the entire federal judicial system at once to an extreme, costly, and essentially untested revision of a major component of civil litigation. That seems to me unwise. Any major reform of the discovery rules should await completion of the pilot programs authorized by Congress, especially since courts already have substantial discretion to control discovery.² See Fed. Rule Civ. Proc. 26.

I am also concerned that this revision has been recommended in the face of nearly universal criticism from every conceivable sector of our judicial system, including judges, practitioners, litigants, academics, public interest groups, and national, state and local bar and professional associations. See generally Bell, Varner, & Gottschalk, *Automatic Disclosure in Discovery—The Rush to Reform*.

¹ I do not disagree with the proposal to make law firms liable for an attorney's misconduct under the Rule, see Proposed Rule 11(c), or with the proposal that Rule 11 sanctions be applied when claims in pleadings that at one time were not in violation of the rule are pursued after it is evident that they lack support, see Proposed Rule 11(b); Advisory Committee Notes to Proposed Rule 11, p. 91.

² It is curious that the proposed rule regarding sanctions for discovery abuses requires sanctions and specific recommendations financial sanctions and compensation to the moving party. See Proposed Rule 37 a(4)(A). No explanation for the recommendations is given.

³ For the same reason, the proposed presumptive limits on depositions and interrogatories, see Proposed Rules 30, 31, and 33, should not be implemented.

27 Ga. L. Rev. 1, 28-32, and nn. 107-121 (1992). Indeed, after the proposed rule in essentially its present form was published to comply with the notice-and-comment requirement of 28 U. S. C. § 2071(b), public criticism was so severe that the advisory committee announced abandonment of its duty-to-disclose regime (in favor of limited pilot experiments), but then, without further public comment or explanation, decided six weeks later to recommend the rule. 27 Ga. L. Rev., at 35.

* * *

Constant reform of the federal rules to correct emerging problems is essential. JUSTICE WHITE observes that Justice Douglas, who in earlier years on the Court had been wont to note his disagreements with proposed

changes, generally abstained from doing so later on, acknowledging that his expertise had grown stale. *Ante*, at 5. Never having specialized in trial practice, I began at the level of expertise (and of acquiescence in others' proposals) with which Justice Douglas ended. Both categories of revision on which I remark today, however, seem to me not matters of expert detail, but rise to the level of principle and purpose that even Justice Douglas in his later years continued to address. It takes no expert to know that a measure which eliminates rather than strengthens a deterrent to frivolous litigation is not what the times demand; and that a breathtakingly novel revision of discovery practice should not be adopted nationwide without a trial run.

In the respects described, I dissent from the Court's order.

APPENDIX 25.—LETTER FROM JOHN P. SWEENEY, ESQ., MILES & STOCKBRIDGE, TO HON. WILLIAM J. HUGHES, CHAIRMAN, JUNE 25, 1993

LAW OFFICES

MILES & STOCKBRIDGE

10 LIGHT STREET

BALTIMORE, MARYLAND 21202

TELEPHONE 410-727-6464

FAX 410-385-3700

300 ACADEMY STREET
CAMBRIDGE, MARYLAND 21613101 BAY STREET
EASTON, MARYLAND 2160111950 RANDOM HILLS ROAD
FAIRFAX, VIRGINIA 2203030 WEST PATRICK STREET
FREDERICK, MARYLAND 2170132 WEST JEFFERSON STREET
ROCKVILLE, MARYLAND 20850600 WASHINGTON AVENUE
TOWSON, MARYLAND 212041450 O STREET, N.W.
WASHINGTON, D.C. 20005

June 25, 1993

The Honorable William J. Hughes,
Chairman
House Subcommittee on Intellectual Property
& Judicial Administration
207 Cannon House Office Building
Washington, D.C. 20515-6216

Attention: Edward O'Connell, Esquire

Re: Proposed Changes to the Federal Rules of Civil
Procedure

Dear Chairman Hughes:

Please consider this letter as my opposition to the proposed amendments to Rule 26(a)(1) of the Federal Rules of Civil Procedure. This rule should not be adopted for the following reasons:

1. The proposed standard for disclosure is an amorphous one. This lack of clear standards for disclosure will not result in an acceleration in the exchange of basic information or the elimination of paperwork. Rather, the rule will have the opposite effect -- more, not less litigation. This litigation will center around the meaning of the statute and its terms. For instance, the term "relevant" lacks defined meaning, and will be the springboard for countless discovery hearings. While giving little definitive guidelines as to the limits of the required disclosure, the rule also blurs the distinction between privileged and nonprivileged information. Due in large part to the absence of definitive standards and protections, a majority of the legal community opposes the proposed amendment.
2. The proposed amendment conflicts with the very nature of the adversarial justice system. The justice system

is premised on adversity between litigants. Courts and juries rely on this adversity to sharpen the presentation of issues and facts.

In the course of the adversarial discovery process, disputes involving work product and privileges arise. The proposed rule obliterates fundamental distinctions between work product and other documentation or information and gives the lawyer little to no guidance as to what is privileged. This will box attorneys into ethical dilemmas since it requires a disclosure of all materials which might even remotely be relevant to a party's case.

3. The proposed standard will increase the number of frivolous lawsuits by paving an avenue for "speculators" to thrive. Normally, individuals will not file complaints until they possess information to assist them in the case. Under the proposed disclosure rule, however, individuals may speculate as to whether their claims are valid. These individuals will be able to file a claim in the hopes that the opposing party will have some relevant information.
4. The proposed amendment will require disclosure even in cases where it may not be necessary or appropriate. Almost 70% of all cases settle before going to trial. This includes a significant number of cases in which discovery is not undertaken before the case is settled. By requiring parties to engage in early disclosure, the proposed amendment will increase the cost of litigation.
5. The proposed amendment also is likely to increase motion practice and satellite litigation over disclosure. Since the disclosure standards are unclear and not well defined, advocates may be tempted to withhold a greater amount of information than under current standards, thereby increasing the use of motions to compel production, and other procedures which would challenge the disclosure or nondisclosure of certain items, documents, and materials. This would succeed only in increasing litigation costs.
6. There already are reforms under way as a part of the Civil Justice Reform Act of 1990 (CJRA). The proposed amendment interferes with the CJRA plans, making it difficult, if not impossible, to assess the

effectiveness of any possible improvements under the Act.

I respectfully request the House Subcommittee on Intellectual Property & Judicial Administration to delete proposed Rule 26(a)(1) from the proposed amendments to the Federal Rules of Civil Procedure. Thank you for your consideration.

Sincerely,

John P. Sweeney 16LL

John P. Sweeney

JPS/mlp

APPENDIX 26.—LETTER FROM GEORGE A. RIEMER, ASSOCIATE EXECUTIVE DIRECTOR AND GENERAL COUNSEL, OREGON STATE BAR (WITH ATTACHMENT), TO HON. WILLIAM J. HUGHES, CHAIRMAN, JUNE 29, 1993



RECEIVED

5200 S.W. Meadows Road, P.O. Box 1689, Lake Oswego, Oregon 97035-4889
(503) 620-0222 or WATS 1-800-452-8260. FAX: (503) 684-1366

JUL 8 1993

Sub on Courts

June 29, 1993

The Honorable William J. Hughes
241 Cannon House Office Building
Washington, D.C. 20515

Re: Oregon State Bar Resolution Opposing the Proposed Changes to
Federal Rules of Civil Procedure 11 and 26

Dear Congressman Hughes:

As you may know, on April 22, 1993, the Supreme Court submitted to Congress, proposed changes to the Federal Rules of Civil Procedure. The rule changes will go into effect on December 1, 1993, unless Congress passes legislation modifying or eliminating the proposed changes. That is, if Congress does nothing, the proposed changes will become law.

There is strong opposition by Oregon lawyers to the proposed changes to Rule 26, particularly with regard to the Rule 26 changes calling for early "automatic disclosure" of witnesses and documents in civil lawsuits. There is similar opposition to the proposed changes to Rule 11.

The Oregon State Bar is a statutorily created professional association; every practicing attorney in the state of Oregon is a member of the Oregon State Bar. At its June 19 meeting, the Oregon State Bar Board of Governors passed a resolution formally opposing the proposed changes to Rules 11 and 26. A copy of the resolution is enclosed.

Note that the resolution "urges the Congress to enact the necessary legislation, pursuant to 28 USC § 2074, so that the proposed changes to Federal Rules of Civil Procedure 11 and 26 do not become law." We are writing to you so that you know of the Oregon State Bar's position, and we would ask that you assist in the effort to "undo" these proposed changes to Rules 11 and 26.

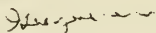
If you have any questions, you should contact James L. Hiller, a member of the Oregon State Bar's Federal Practice and Procedure Committee. Mr. Hiller has

been tracking these proposed changes for the Bar, and he can be reached as follows:

James L. Hiller
Lane Powell Spears Lubersky
520 S.W. Yamhill Street
Suite 800
Portland, OR 97204-1383
Telephone: (503) 778-2104
Telefax: (503)-224-0388

Thank you for your attention to this matter.

Very truly yours,



George A. Riemer
Associate Executive Director
and General Counsel

Enclosure



5200 S.W. Meadows Road, P.O. Box 1689, Lake Oswego, Oregon 97035-0889
 (503) 620-0222 or WATS 1-800-452-8260, FAX (503) 681-1466

***OREGON STATE BAR RESOLUTION OPPOSING THE PROPOSED
 CHANGES TO FEDERAL RULES OF CIVIL PROCEDURE 11 AND 26***

The Oregon State Bar, through its Federal Practice and Procedure Committee, has reviewed the proposed changes to Federal Rules of Civil Procedure 11 and 26, transmitted on April 22, 1993 by the United States Supreme Court to the Congress of the United States. The Board of Governors of the Oregon State Bar considered a report from the Bar's Federal Practice and Procedure Committee regarding the proposed changes, at its June 19, 1993 meeting.

The Board of Governors of the Oregon State Bar opposes the proposed changes to Rule 26, particularly the automatic disclosure requirements of proposed rule 26(a)(1). The reasons for the Board's opposition are well-stated and included in Justice Scalia's dissent to the adoption of the proposed rule amendments, 146 FRD 507 (April 22, 1993). These reasons include:

- 1) Automatic disclosure will not reduce discovery expense and delay, but rather will increase discovery burdens on practitioners, litigants and courts, alike.
- 2) Automatic disclosure will place intolerable strain upon a lawyer's ethical duty to represent his or her client and not to assist the opposing side.
- 3) Automatic disclosure should be subjected to significant testing on the local level before it is adopted nationally.

The Board of Governors of the Oregon State Bar also opposes the proposed changes to Rule 11. Again, the reasons for the Board's opposition are well-stated and included in Justice Scalia's dissent. In particular, the proposed Rule 11 amendments will eliminate a significant and necessary deterrent to frivolous litigation.

The Board of Governors of the Oregon State Bar, therefore, urges the Congress to enact the necessary legislation, pursuant to 28 USC § 2074, so that the proposed changes to Federal Rules of Civil Procedure 11 and 26 do not become law.

APPENDIX 27.—LETTER FROM FRANK P. BRAMBLE, PRESIDENT AND
CHIEF EXECUTIVE OFFICER, MNC FINANCIAL, TO HON. WILLIAM
J. HUGHES, CHAIRMAN, JUNE 23, 1993



FRANK P. BRAMBLE
PRESIDENT AND CHIEF EXECUTIVE OFFICER

June 23, 1993

VIA FEDERAL EXPRESS

The Honorable William J. Hughes, Chairman
House Subcommittee on Intellectual
Property and Judicial Administration
207 Cannon House Office Building
Washington, D.C. 20515-6216

Attention: Edward O'Connell, Esquire

Re: Amended Rule 26(a)(1)
Federal Rules of Civil Procedure

Dear Congressman Hughes:

This letter is to record the very strong opposition of the bank holding company, MNC Financial, Inc. and its subsidiaries (including, but not limited to Maryland National Bank, American Security Bank and Virginia Federal Savings & Loan - hereinafter referred to collectively as "MNC"), to Amended Rule 26(a)(1) of the Federal Rules of Civil Procedure (hereinafter "Amended Rule 26(a)(1)"). In certain kinds of cases, Amended Rule 26(a)(1) will impose unnecessary and significant burdens and expenses on MNC. In all cases, Amended Rule 26(a)(1) will create an ethical dilemma. It is also anticipated that Amended Rule 26(a)(1) will create new types of discovery disputes.

On the other amendments to the Federal Rules of Civil Procedure that are currently before the subcommittee, MNC takes no

position. Some of the amendments will probably be beneficial and some of the amendments may not. Any problems presented by the other amendments are, however, totally overshadowed by the problems that Amended Rule 26(a)(1) will engender. Consequently, MNC will limit its comments to Amended Rule 26(a)(1).

MNC would emphasize that it opposes Amended Rule 26(a)(1) only after careful consideration. MNC is a significant user of the courts, mostly as a plaintiff, but to a lesser extent as a defendant. MNC is, therefore, keenly aware of the litigation process, and knowledgeable about the issues that Amended Rule 26(a)(1) intends to address.

One issue obviously concerns the expenses and burdens of discovery. Admittedly, the purpose of Amended Rule 26(a)(1) is laudatory. It is intended to streamline litigation and to reduce discovery disputes. See Committee Notes. MNC is not aware, however, of any empirical data that indicates the efficacy of Amended Rule 26(a)(1) in making discovery less expensive or less burdensome.

Based upon its experience as a party to many hundreds of lawsuits each year, MNC can state that Amended Rule 26(a)(1) will make discovery more burdensome and expensive. These burdens and expenses will be borne more by litigants such as MNC, rather than by attorneys¹ or even the courts. MNC hopes, therefore, that its

¹It is interesting to note that many commentators have characterized the opposition to Amended Rule 26(a)(1) as that of "entrenched attorneys" who see the amended rule as a threat to their fees. This type of commentary is only sensational and cannot withstand any rigorous scrutiny, as the Subcommittee should

comments and the comments of other major litigants will be given sufficient weight by the Subcommittee and by Congress.

MNC respectfully directs the Subcommittee's attention to the breadth and depth of the opposition to Amended Rule 26(a)(1). Further evidence of the opposition to prediscovery disclosure can be found in the recent events that transpired in Maryland. Amendments similar to Amended Rule 26(a)(1) concerning prediscovery disclosure, were proposed for the Maryland Rules of Civil Procedure. Comments¹ from twenty-seven (27) different individuals and organizations were submitted to the Maryland Court of Appeals. Not one comment supported the proposed amendments on prediscovery disclosure as drafted. Only one comment clearly endorsed the concept of prediscovery disclosure as a rule of general application. This kind of opposition to prediscovery disclosure clearly shows that implementation of Amended Rule 26(a)(1) is not appropriate at this time.

By way of constructive proposal, MNC urges Congress to await a more thorough evaluation of the data that is being generated around the country in a number of pilot/experimental programs that are currently under evaluation in various United States district courts. Many districts are attempting to implement various types of case management plans, some of which contain some sort of pre-

recognize. If anything, avaricious attorneys should welcome Amended Rule 26(a)(1) because it will create expensive types of new discovery disputes.

¹A copy of the proposed amendments to the Maryland discovery rules, along with the comments that were submitted, accompany this letter in a three-ring binder.

discovery disclosure requirements similar or identical to Amended Rule 26(a)(1). These programs are in the preliminary stages. It may be that some sort of pre-discovery disclosure is workable, but Amended Rule 26(a)(1) promises to be more harmful than helpful.

To explain its position more fully, MNC endorses the statement of Alfred W. Cortese, Jr. submitted to the Subcommittee on behalf of a coalition of groups opposed to Amended Rule 26(a)(1)³. MNC also emphasizes the following points.

Amended Rule 26(a)(1)
Will Impose Unnecessary and
Significant Burdens.

It has been MNC's experience over the past few years that many claims are made for the purpose of creating a heavy discovery burden, which then acts as leverage to extort a settlement. Since Amended new Rule 26(a)(1) will unfairly increase the costs and burdens of litigation in certain cases, it will only exacerbate that extortion factor. This by-product of Amended Rule 26(a)(1) alone is sufficient to overcome any possible benefit.

Another major concern to MNC is that Amended Rule 26(a)(1) will result in MNC having to incur significant costs and expenses - in time, effort, and money - in gathering data and documents for

³Mr. Cortese's statement of June 16, 1993 was submitted to this Subcommittee on behalf of the Business Roundtable Lawyers Committee, the Chamber of Commerce of the United States, the National Association of Manufacturers, the American Association of Railroads, the American Automobile Manufacturers Association, the American Banker's Association, the Product Liability Advisory Council, Inc., the Defense Research Institute, the Federation of Insurance and Corporate Counsel, the International Association of Defense Counsel, and Lawyers for Civil Justice.

prediscovery disclosure, when a claim being asserted against MNC is worthless or frivolous or both. Requiring MNC, or any party, to engage in a discovery process, when no legally cognizable claim has been asserted, is antithetical to the spirit and letter of Rule 1, Fed. R. Civ. Pro. Rule 1 states: "They [the Federal Rules of Civil Procedure] shall be construed to secure the just, speedy, and inexpensive determination of every action." (emphasis added)

In those cases where the legal sufficiency of the claim is challenged by a preliminary motion, Amended Rule 26(a)(1) may complicate the case or increase unjustifiable expenses and burdens, rather than simplify the case or decrease expenses. Admittedly, Amended Rule 26(a)(1) permits a modification to the pre-discovery disclosure requirement by way of stipulation or court order. It is clear, however, that the tenor of all the amendments is to accelerate discovery. Because of this general orientation of the amendments, a judge may be loath to delay prediscovery disclosure except in the most egregious circumstances, which is not what judges generally do now⁴ and is hardly an inexpensive way to

⁴Under the existing Rules of Federal Civil Procedure, courts usually delay discovery if the legal sufficiency of the Complaint is seriously challenged. See Rutman Wine Co. v. E. & J. Gallo Winery, 829 F.2d 729, 738 (9th Cir. 1987) (purpose of Rule 12 (b) (6) is to enable defendants to challenge legal sufficiency of complaint before having to incur the expense of discovery); Greene v. Emersons Ltd., 86 F.R.D. 66, 73 (S.D.N.Y. 1980), aff'd, Kenneth Leventhal & Co. v. Joyner Wholesale, Co., 736 F.2d 29 (2d Cir. 1984) (Rule 12(b)(6) intended to allow a defendant to defeat a claim as a matter of law without having to provide discovery); Havoco of America Ltd. v. Shell Oil Co., 626 F.2d 549, 553 (7th Cir. 1980) ("[I]f the allegations of the complaint fail to establish the requisite elements of the cause of action, our requiring costly and time consuming discovery and trial work would represent an abdication of our judicial responsibility.").

resolve the action within the meaning of Rule 1, Fed. R. Civ. Pro. Further, a party seeking to force a settlement by driving up the costs of the proceedings is unlikely to stipulate that discovery should wait until the court rules on a pending Motion to Dismiss.

Amended Rule 26(a)(1)
Will Create an
Ethical Dilemma.

An attorney's obligation should be to protect his clients' interests within the bounds of professional responsibility. Amended Rule 26(a)(1) subtly, but significantly alters that relationship. Amended Rule 26(a)(1) would require the attorney not only to represent his client, but affirmatively to inform the opposition of how the attorney intends to accomplish that representation. It would require MNC's attorneys to identify those persons and documents that contain their theory of the case. This is a radical departure from historical discovery practices.

Ordinarily, one party asks for documents or information from the opposition, which the requesting party considers to be relevant. By contrast, Amended Rule 26(a)(1) requires the responding party to identify everything that is relevant to its own theory of the case. That is a materially different requirement. It establishes a process that is at odds with the attorney's obligation to his client. It is a process that is at odds with the work product doctrine. It encourages an attorney to delay his preparation of the case, because he cannot be required to disclose documents or information about a factual dispute until he

determines that the alleged fact is disputed.

Amended Rule 26(a)(1)
Will Create New Types
of Discovery Disputes.

It is anticipated that Amended Rule 26(a)(1) will not resolve discovery disputes. Rather, MNC anticipates that Amended Rule 26(a)(1) will create new types of discovery disputes.

Amended Rule 26(a)(1) requires the disclosure of documents or persons with information, "relevant to disputed facts alleged with particularity in the pleadings." The definition of "relevance" is unclear. It is also not at all clear what constitutes a "fact" alleged with enough "particularity" so as to require disclosure if the "fact" is disputed. Generally, notice pleading is all that is required.

The historical practice for discovery is to permit inquiries into any area that is reasonably calculated to lead to the discovery of admissible evidence. See Rule 26(b)(1) Fed. R. Civ. Pro. It is not yet known whether "relevant" is meant to be broader or narrower than the traditional scope of discovery. Similarly, even if "relevant" is meant to be broader or narrower than traditional discovery, the question is - how much broader or how much narrower?

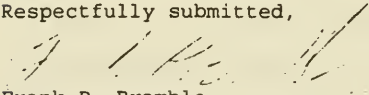
Disputes over the meaning of these new terms will inevitably arise during the course of a lawsuit. These disputes will be in addition to traditional discovery disputes. This is precisely the opposite effect of what is nominally intended by the drafters of Amended Rule 26(a)(1).

MNC's Proposal

At this point in time, Congress should not allow such a significant change as Amended Rule 26(a)(1) to be implemented. If a requirement for pre-discovery disclosure is feasible and meritorious, the evidence of that feasibility and merit will emerge shortly from the evaluations of the experimental/pilot programs that are currently under way in the U.S. district courts under the Civil Justice Reform Act of 1990.⁵ There is no compelling reason why such a radical change is immediately needed for the federal discovery rules, particularly when the practical feasibility of mandatory prediscovery disclosure is untested.

Amended Rule 26(a)(1) contains many significant problems. If those problems can be overcome, as demonstrated by the pilot programs in the U.S. district courts, then a suitable rule with a proven record can be implemented. Amended Rule 26(a)(1), however, is not suitable and should not be allowed to become effective on December 1, 1993.

Respectfully submitted,



Frank P. Bramble
President and Chief Executive Officer
MNC Financial

⁵Pub. L. No. 101-500, 104 Stat. 5089 (1990).

APPENDIX 28.—LETTER FROM HARVEY J. REED FOR DAVID A. BRUNE, GENERAL COUNSEL, BALTIMORE GAS AND ELECTRIC, TO HON. WILLIAM J. HUGHES, CHAIRMAN, JULY 1, 1993

RECEIVED

JUL 8 1993

BALTIMORE
GAS AND
ELECTRIC

Sub on Courts

CHARLES CENTER · P. O. BOX 1475 · BALTIMORE, MARYLAND 21203

DAVID A. BRUNE
GENERAL COUNSEL

July 1, 1993

The Honorable William J. Hughes, Chairman
House Subcommittee on Intellectual Property
and Judicial Administration
207 Cannon House Office Building
Washington, D.C. 20515-6216
Attention: Edward O'Connell, Esquire

Re: Proposed Rule 26(a)(1) Disclosure
to the Federal Rules of Civil Procedure

Dear Mr. O'Connell:

Proposed Rule 26(a)(1) which requires automatic disclosure of all witnesses and documents "relevant to dispute facts" places an unreasonable burden on the parties to the litigation, particularly corporate defendants. As you are aware, many actions which are filed have not been properly investigated to determine the merits of the suit. A number of these actions have little or no merit. Defendants are often able to dispose of such cases with a Motion to Dismiss, or after taking a deposition or two, file a successful Motion for Summary Judgment.

Rule 26(a)(1) (Disclosure) would dramatically increase litigation expenses, make discovery more burdensome and ultimately, substantially slow down the judicial process by requiring the parties to determine what is "relevant". This determination will lead to challenges to the party's discretionary interpretation of relevance. The opposing party will file additional motions requesting interpretation and even sanctions to address the other side's determination of relevancy. Disclosure would also result in ethical questions being raised as to the attorney-client confidential relationship as well as to attorney work-product privilege, particularly with in-house staffs. In-house counsel are required to render opinions, participate in discussions and help direct corporate policy in a variety of settings. Those opinions may well be "relevant" to disputed facts. To disclose such thought processes would reveal to an opponent a level of factual inquiry or legal reasoning that the opponent would never have considered or litigated on its own.

Consequently, these disclosures would expand the scope of the matter litigated instead of limiting it. Work product was intended to protect and promote the thought process of opposing attorneys. Disclosure would force the early revealing of an in-house counsel's approach to corporate policies and procedures.

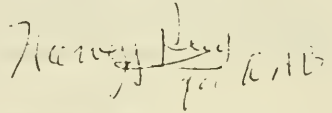
In addition, the disclosure standards are vague and unclear. Rather than address the present abuses of discovery, this proposed rule would further complicate the procedure.

Finally, as pointed out above, requiring parties to "disclose" in all cases seems to be unnecessary. Many cases are presently resolved quickly and inexpensively without the necessity of extensive discovery. In the more complex cases, extensive discovery is both needed and undertaken by the parties to the extent they deem necessary.

While the intention to address discovery abuse is laudable, we believe the proposed disclosure rule would not accomplish that goal. Therefore, we oppose the adoption of proposed Rule 26(a)(1) Disclosure. We are all committed and eager to improve the judicial system to the greatest extent possible, but this measure fails to do so and, in fact, is a step in the opposite direction.

We appreciate the opportunity to comment on the proposed rule and hope you find our comments constructive.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Harvey K. Lewis". The signature is written in a cursive, somewhat stylized font. Below the main signature, there is a smaller, less legible handwritten mark that could be interpreted as "for KLB".

HJR:dmm

**APPENDIX 29.—LETTER FROM CHARLES E. FENTON, VICE PRESIDENT
AND GENERAL COUNSEL, BLACK & DECKER, TO HON. WILLIAM J.
HUGHES, CHAIRMAN, JUNE 15, 1993**

The Black & Decker Corporation
207 Cannon House
Washington, D.C. 20515-6216

Charles E. Fenton
Vice President and General Counsel

BLACK & DECKER®

June 15, 1993

The Honorable William J. Hughes, Chairman
House Subcommittee on Intellectual Property
and Judicial Administration
207 Cannon House Office Building
Washington, D.C. 20515-6216

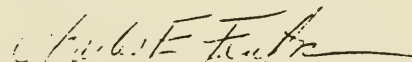
Attention: Edward O'Connell, Esq.

Dear Chairman Hughes:

We urge rejection of proposed Rule 26(a)(1) of the Federal Rules of Civil Procedure on the grounds that it imposes an unnecessary burden on defendants in frivolous cases that should be disposed of on motion at minimum expense, and in serious cases, will give rise to a new generation of discovery disputes over its application.

Thank you for your consideration.

Sincerely,


Charles E. Fenton

CEF/dg

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